

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1978

NO. 78-985

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL.,  
*Petitioners,*

v.

TEXAS EDUCATION AGENCY, ET AL.,  
*Respondents,*

UNITED STATES OF AMERICA,  
*Applicant for Intervention.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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Petitioners, Gregory-Portland Independent School District, K. D. Dreiling, George E. Cook, J. E. Bradford, R. G. Williams (deceased), Rodger M. East, Leonel Rios, Felix Guettler, and the minor children and residents of the Gregory-Portland Independent School District for whose benefit they sue, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 10, 1978.

### OPINIONS BELOW

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the Court of Appeals:<sup>1</sup>

(1) The District Court's order preliminarily enjoining suspension of state accreditation and denial of state funds by the Texas Education Agency to Gregory-Portland Independent School District, dated January 24, 1974 (Appendix, p. 1);

(2) The District Court's memorandum opinion denying the motion of the Texas Education Agency to dismiss for want of jurisdiction, dated February 28, 1974 (Appendix, p. 6);

(3) Opinion of the United States Court of Appeals for the Fifth Circuit refusing the United States' request that the United States District Court for the Southern District of Texas be mandamus'd to dismiss this proceeding or to transfer it to the United States District Court for the Eastern District of Texas, dated December 30, 1974 (Reported at 506 F.2d 383) (Appendix, p. 11);

(4) The District Court's Memorandum and Order finding no unconstitutional discrimination on the part of Gregory-Portland Independent School District, and permanently enjoining suspension of funds and denial of accreditation to the School District by the Texas Education Agency, dated January 30, 1976 (Appendix, p. 14);

(5) The District Court's judgment permanently enjoining suspension of funds and denial of accreditation by the Texas Education Agency to Gregory-Portland Independent School District, dated January 30, 1976 (Appendix, p. 28);

1. Pursuant to the provisions of Supreme Court Rule 23(i) the Appendix is separately presented because of its volume.

(6) The District Court's order denying the United States' motion for leave to intervene, dated May 14, 1976 (Appendix, p. 30);

(7) Opinion of the United States Court of Appeals for the Fifth Circuit vacating all orders and dissolving the permanent injunction entered by the United States District Court for the Southern District of Texas, and directing the dismissal of the case or its transfer to the United States District Court for the Eastern District of Texas, dated July 10, 1978 (reported at 576 F.2d 81) (Appendix, p. 38);

(8) Letter from the Clerk of the United States Court of Appeals for the Fifth Circuit advising that Petitioners' petition for rehearing and petition for rehearing *en banc* had been denied, dated September 22, 1978 (Appendix, p. 43);

(9) Judgment of the United States Court of Appeals for the Fifth Circuit in conformity with its prior opinion, issued as mandate October 2, 1978 (Appendix, p. 44);

### JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 10, 1978 (Appendix, p. 38), and a petition for rehearing and for rehearing *en banc* were timely filed. The two petitions were denied on September 22, 1978 (Appendix, p. 43).

This Court has jurisdiction to review the action of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of Title 28 U.S.C. § 1254.

### QUESTIONS PRESENTED

1. May a federal district court, acting through the medium of a mandatory injunction directed to a state

agency (here the Texas Education Agency, a defendant in *United States v. Texas*<sup>2</sup>), establish a presumption that unconstitutional discrimination has occurred in any school district in the state which has a single school with a Mexican-American enrollment exceeding 66%, require that such school districts be denied accreditation and state funds, and then impose upon those who seek relief the burden of proving, in a distant and inconvenient forum, that no discrimination has occurred?

2. May Texas school districts, such as Gregory-Portland Independent School District, which are separate legal entities and which were not parties to *United States v. Texas*, prove to the Texas Education Agency in local federal courts that they have never discriminated against Mexican-Americans, and that the condition precedent to the imposition of the sanctions set out in *United States v. Texas* therefore does not exist, or must that proof always be made in the Eastern District of Texas?

3. Did the United States Court of Appeals for the Fifth Circuit err in vacating the orders of the United States District Court for the Southern District of Texas at the request of the United States, which was not a party to the original proceeding and which, to this very day, has not been granted leave to intervene at either the trial or appellate level?

### STATEMENT OF THE CASE

Petitioners, a group of Anglo and Mexican-American parents and the Gregory-Portland Independent School District, instituted this suit in the United States District

2. 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235 (E.D. Tex. 1971), aff'd. and mod. 447 F.2d 441 (5th Cir. 1971), cert. den. 404 U.S. 1016, 92 S.Ct. 675 (1972).

Court for the Southern District of Texas, Corpus Christi Division (hereafter "the Southern District Court"). The defendant was the Texas Education Agency (the "TEA"); the purpose of the suit was to enjoin the suspension by the TEA of the School District's accreditation and participation in state funds by demonstrating that the School District had never discriminated against Mexican-Americans. The United States was not a party to the suit and has never been granted leave to intervene; it is not a party now.

Suspension of the School District's accreditation was a serious matter. It would have resulted in the refusal by other school districts to accept earned credits of students transferring from Gregory-Portland, and in the inability of its graduating seniors to gain admission to college. Loss of its half million dollar share of state funds would have rendered impossible the conduct of the Gregory-Portland educational program.

The TEA's proposed suspension of the School District's accreditation and withholding of state funds were in obedience to orders directed to the TEA by the United States District Court for the Eastern District of Texas, Tyler Division (the "Eastern District Court") in *United States v. Texas*, a suit to which Gregory-Portland has never been a party. The suspension was to be effective without a hearing of any type, based solely upon enrollment reports which reflected a 92% enrollment of Mexican-Americans at one of the School District's three elementary schools. [Appendix, p. 2, paras. (2),(3)].

Since the force which impelled the TEA was an order of the Eastern District Court in *United States v. Texas*, a description of that litigation is necessary.

In *United States v. Texas, supra*, the Eastern District Court was confronted with a classic school desegregation case arising out of the "creation and continued maintenance of nine all-Black school districts." 321 F.Supp. at 1045. The TEA was also a party to the suit, and was charged with having "failed as the chief supervisory body of public education in Texas and as disbursing of State educational assistance, adequately to oversee and supervise the districts within the State so that no child was denied on the ground of race the benefits of programs supported by Federal funds." 321 F.Supp. at 1045.

The suit was clearly directed to dismantling of a dual system of schools previously maintained pursuant to a state law requiring segregated facilities for black and white children. The existence of past discrimination against blacks was a conceded fact. The suit was in no way concerned with alleged segregation of or discrimination against Mexican-American children. No state legislation has ever required the maintenance of separate school facilities for Mexican-Americans. No federal court, including the Eastern District Court, has ever declared that Mexican-Americans have been generally discriminated against by all school districts in the State, or by the Gregory-Portland Independent School District in particular.

Noting the legislative history requiring dual school systems for black and white children (321 F.Supp. at 1050), the Eastern District Court concluded that equitable relief was required and meted out that relief in two separate orders. The first order was directed to the preparation of desegregation plans for the specific school districts which were parties to the suit. 321 F.Supp. 1059-1060. The second order, in rather general

terms, enjoined the TEA from assisting directly or indirectly in the maintenance or re-creation of a dual school system within the State of Texas (321 F.Supp. 1060-1062); it directed the TEA to report to the Court each school district in the State of Texas having one or more schools with an enrollment composed of "more than 66% of members of a minority group or more than 90% of the caucasian race", and to outline any actions taken by the TEA to assist those school districts in eliminating "racially identifiable schools." 321 F.Supp. at 1062. In a supplemental order the Eastern District Court reviewed its earlier order and the responses of the Texas Education Agency, of the United States, and of the various school districts which *were* parties to the suit, to the plan incorporated in the original order. *United States v. Texas*, 330 F.Supp. 235 (E.D. Texas 1971). On appeal, the orders of the trial court were modified in particulars not here important and affirmed. *United States v. Texas*, 447 F.2d 441 (5th Cir. 1971), cert. den. 404 U.S. 1016, 92 S.Ct. 675 (1972). Upon receipt of the Fifth Circuit's opinion, the Eastern District Court entered a Modified Order dated July 13, 1971, conforming its earlier orders with the Fifth Circuit's ruling. (Appendix, p. 46)

The Modified Order directed the suspension of accreditation and/or funds of school districts which engaged in transfer policies [Appendix, p. 49, para. A(4)], changed school boundaries [Appendix, p. 50, para. B(4)], operated transportation systems [Appendix, p. 53, para. C(4)], permitted extra-curricular activities [Appendix, p. 54, para. D(4)] or engaged in hiring practices [Appendix, p. 57, paras. E(4) and (5)], in such manner as to impede desegregation or to encourage discrimina-

tion. No such sanctions were directed to student enrollment. The Modified Order provided only that the TEA should

“ . . . (R)evue each year all school districts in the state in which there exist schools enrolling more than 66% minority group students . . . and shall make findings as to whether or not the student assignment plans of these districts have resulted in compliance with federal constitutional standards. [Appendix, p. 58, para. F(3)]

On August 9, 1973, however, the Eastern District Court amended its Modified Order of July 13, 1971 in a number of important respects. (Appendix, p. 63) First, the TEA's review of school districts with individual schools having enrollments of 66% minority students was no longer directed toward a determination that the student assignment plans “resulted in compliance with federal constitutional standards,” as the previous order provided. Now the standard was completely different. The inquiry to be made was

“ . . . (W)hether or not the student assignment plans of these districts have resulted *in compliance with the terms of this order.*” [Appendix, p. 63, para. F(3)]

Moreover, the August, 1973 amendment directed the TEA to notify each school district in which there were schools enrolling more than “66% minority group students” that the district was in violation of the Eastern District Court's order and to provide each such district with a detailed plan “designed to eliminate all such violations.” [Appendix, pp. 68-69, paras. F(3),(4)] Upon

the failure of such a district to implement a plan “eliminating all racially or ethnically identifiable schools” found to be in violation of the Court's order “as provided by paragraph F(3)” —the 66% standard—accreditation and further participation in state educational funds were to be suspended. [Appendix, p. 69, paras. F(4), (5)] By way of small consolation, second only to none at all, the order provided that a district aggrieved by the loss or proposed loss of funds and accreditation had the right to petition the Eastern District Court “for such relief as said court may deem proper.” [Appendix, p. 70, para. F(8)]

Shortly after the entry of the August, 1973 order, the TEA gave notice that because one of Gregory-Portland's elementary schools failed to meet the Eastern District Court's statistical standards, suspension of accreditation and funds was forthcoming if a new student assignment plan were not adopted.

Gregory-Portland had never discriminated against Mexican-Americans, as the Southern District Court subsequently found after a full trial. (Appendix, pp. 14-27) And so it and a group of parents sued the TEA in the Southern District Court in Corpus Christi, Texas, a scant seven miles away. They sought a declaration that the School District had not engaged in unconstitutional segregation of its children and that there was therefore no basis for federal court-ordered intervention; they requested that the TEA therefore be enjoined from suspending accreditation and funds on the basis of its contention to the contrary.

The trial court entered a temporary restraining order, enjoining suspension of accreditation and funds until an

evidentiary hearing could be had. (Appendix, p. 1) The Texas Education Agency then filed a motion to dismiss the suit for want of jurisdiction or, alternatively, to transfer the cause to the Eastern District Court in Tyler, Texas. Although it was not a party to the suit, the United States filed an *amicus curiae* brief in support of the TEA's motion. After hearing evidence, the Southern District Court denied the motion to dismiss or transfer, and continued the preliminary injunction in force pending the trial of the discrimination question on its merits. (Appendix, p. 6)

The United States thereupon petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus or prohibition directing the dismissal of the case for want of jurisdiction or its transfer to the Eastern District Court. The writs were denied, both because the United States was not a party to the proceeding and because the Fifth Circuit perceived no inevitable conflict between the judgment to be entered by the Southern District Court and the orders of the Eastern District Court. *United States v. United States District Court, Southern District of Texas*, 506 F.2d 383 (5th Cir. 1974). (Appendix, p. 11)

Though the discrimination issue was now to be tried on its merits in the Southern District Court, the United States refused to intervene or otherwise seek active party status in the litigation. The case was tried on its merits in Corpus Christi. The Southern District Court concluded that the Gregory-Portland Independent School District had never engaged in unconstitutional conduct vis-a-vis its Mexican-American students and residents, and that there was therefore no basis upon which a

federal court, acting through the TEA, could or should suspend accreditation and funds. It permanently enjoined the suspension. (Appendix, p. 14)

At this belated point, the United States finally sought leave to intervene. The Southern District Court concluded that the interest asserted by the United States—confined, as it was, solely to venue, i.e., whether the trial of the case should have taken place in the Eastern District rather than in the Southern District—was an insufficient interest to warrant intervention, and entered an order denying the petition. (Appendix, p. 30) The United States appealed from that order alone. Its notice of appeal was filed on June 14, 1976, seventy-six days after the expiration of the sixty-day period accorded the United States to appeal from the January 30, 1976 merits opinion and judgment. Rule 4(a), Federal Rules of Appellate Procedure.

Not joined by the Texas Education Agency which was apparently satisfied that no basis existed for suspension of funds or accreditation, the United States again proceeded to the Court of Appeals for the Fifth Circuit. This time it sought leave to intervene and, subject to such leave, requested the dismissal or transfer of the case to the Eastern District Court. Leave to intervene was never granted by the Fifth Circuit. Instead, acting at the request of the non-party United States, the Court of Appeals concluded that the trial of the threshold question of discrimination by the Southern District Court "interfered with the integrity of the order from the Eastern District," vacated the permanent injunction and all orders entered, and directed that the case be dismissed

or transferred to the Eastern District Court, over 400 miles away from Gregory-Portland. (Appendix, p. 38)

The opinion of the Court of Appeals turns on its head well-established law with respect to the non-binding effect of a judgment on non-parties, and turns the Court's back to important considerations of economy and expeditious disposal of suits, both from the standpoint of the litigants and of the federal courts. If allowed to stand it will coerce myriad Texas school districts having large Mexican-American enrollments to make a choice for which there is no legal or equitable justification: accede to federal court-ordered reassignment of students or prove the non-existence of the threshold prerequisite to federal court intervention—discrimination—in the United States District Court for the Eastern District of Texas at Tyler, “no matter the miles to be traveled and the money to be spent.” (Southern District Court's Order of February 28, 1974, Appendix, p. 8)

The Fifth Circuit was not 66% wrong, it was 100% wrong; thus this petition.

### **BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE**

The trial court had jurisdiction of this suit because the claims asserted arose under the Constitution of the United States and the Civil Rights Act of 1964, 42 U.S.C. § 1983, and the amount in controversy exceeded \$10,000 exclusive of interest and costs. 28 U.S.C. §§ 1331 and 1343. Federal Court jurisdiction has not been challenged by any party or by the United States.

### **ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT**

#### **A. The inflexible standards and venue provisions set out in *United States v. Texas* were not binding on non-parties such as petitioners.**

The erroneous disposition of this case by the Fifth Circuit exemplifies a point of view which perhaps explains mounting complaints concerning the cost of litigation and the law's delay. If allowed to stand, the decision below will add immeasurably to expense and delay in resolving disputes between the TEA and various Texas school districts as to the existence *vel non* of unconstitutional discrimination against Mexican-American children. The error is compounded by the lower court's disregard of established legal principles which pointed the way to a result which was practical, as well as legally correct.

The first principle which the Fifth Circuit ignored is the fundamental rule that one who is not a party to, is not in privity with a party to, or is not represented in a recognized capacity in a proceeding is not bound by a judgment entered therein. *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434 (1971). In this Court's own language:

“It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). The consistent constitutional rule has been that a court has no power to

adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. E.g., *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456 (1957).” *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562, 1569 (1969).

The Gregory-Portland Independent School District was not a party to and was not in privity with nor represented by a party to *United States v. Texas*. That the TEA was a party is of no moment. In Texas, each independent school district is an entity separate and distinct from the Texas Education Agency. Each is a “local public corporation,” a “quasi-municipal corporation.” *Love v. City of Dallas*, 40 S.W.2d 20 (Tex. 1931). The trustees of a given district are a “body corporate” and they, rather than the TEA, have the exclusive power to manage and govern the district. Texas Education Code, § 23.6.

Obviously flowing from the fact that Gregory-Portland was not a party to the Eastern District proceeding is the corollary: the Eastern District Court never presumed to find that whatever ethnic statistical imbalance existed in one or more of the Gregory-Portland elementary schools was the result of discrimination. Likewise, the Texas Education Agency never undertook such a determination. Instead, acting upon the arbitrary 66% standard established by the Eastern District Court, the TEA ordered the Gregory-Portland Independent School District to revise student assignment to eliminate ethnic imbalance at one of its elementary schools, imbalance which the Southern District Court determined, in a trial on the merits, did not result from unconstitutional conduct. The

TEA candidly stipulated that but for the Eastern District Court’s inflexible order, suspension of funds and accreditation upon the School District’s refusal to agree to a new plan of student assignment would never have been threatened. Clearly the Eastern District Court was doing nothing less than imposing a federal standard of student assignment on all non-party Texas school districts, through its orders to the TEA in *United States v. Texas*. This the Eastern District Court had no authority to do.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267 (1971), this Court said, in speaking to the question of court-ordered remedies:

“In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.” 402 U.S. at 16, 91 S.Ct. at 1276.

“Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis.” 402 U.S. at 28, 97 S.Ct. at 1282.

Again, in *Winston-Salem/Forsyth County Board of Education v. Scott*, 404 U.S. 1221, 92 S.Ct. 1236 (1971), Mr. Chief Justice Burger, in passing on an application for stay, reaffirmed that:

“Under *Swann* and related cases of April 20, 1971, as in earlier cases, judicial power can be involved only on a showing of discrimination violative of the constitutional standards declared in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).” 404 U.S. at 1230, 92 S.Ct. at 1241.

In filing their suit in the Southern District Court, petitioners sought nothing more than to demonstrate the non-existence of the "constitutional violation" declared in *Swann* to be a prerequisite to "judicially ordered assignment of students on a racial basis." The trial court clearly understood. In entertaining petitioners' declaratory judgment action, it did not propose to interfere in any respect with the relationship between the Eastern District Court and the Texas Education Agency or with the orders by which that court undertook to control the activities of the TEA. The Southern District Court specifically stated:

"This court does not purport to contravene the Tyler order, but says that the Texas Education Agency has no right, under the Tyler order or any other order, to impose the sanctions it proposes without a proper finding of the existence of unconstitutional segregation. Without such a finding, there is no fault in the school district. \* \* \* The issues will be generally the same as if minority residents had sought relief from the School District because of unconstitutional segregation, although, perhaps, the burden of proof may be on a different party." (Memorandum, Appendix, p. 9)

The trial court further noted that the Gregory-Portland Independent School District was clearly entitled to accreditation and participation in state funds,

"... unless it should ultimately be determined that the Gregory-Portland Independent School District has engaged or is engaging in discriminatory practices violative of the United States Constitution or has refused to eliminate vestiges of past unconstitutional discrimination." (Memorandum, Appendix, p. 3, para. 6).

The Court emphasized that its only purpose in accepting jurisdiction was

"... to determine the facts and draw its own conclusions of law as to whether or not there is existing unconstitutional segregation in this School District. If such exists, then Texas Education Agency would be entitled to enforce its sanctions, if same were proper, and any relief which the District might want from the sanctions of the Texas Education Agency would, necessarily, have to be gotten from the Tyler Court." (Memorandum, Appendix, p. 10).

By its own declaration, and in fact, the Southern District Court's exercise of jurisdiction to resolve the discrimination question was consistent with and in aid of, rather than adverse to, the orders of the Eastern District Court. That the Eastern District Court previously had spoken to one of the parties to the Corpus Christi proceeding did not preclude action not inconsistent therewith by the Southern District Court at the instance of one who was not a party to the earlier suit. Cf. *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 88 S.Ct. 602 (1968); *American Securit Co. v. Shatterproof Glass Corp.*, 268 F.2d 769 (3rd Cir. 1959), cert. den. 361 U.S. 902, 80 S.Ct. 210 (1959); *Williams v. Nylund*, 268 F.2d 91 (10th Cir. 1959).

As this Court has said in a different but similar constitutional inquiry:

"Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to

contest the State's claim or because they chose to do so and lost.

But it does not follow that a decision reached in such proceedings should conclusively determine the First Amendment rights of others. Nonparties like petitioner may assess quite differently the strength of their constitutional claims and may, of course, have very different views regarding the desirability of disseminating particular materials. We think they must be given the opportunity to make these assessments themselves, as well as the chance to litigate the issues if they so choose." *McKinney v. Alabama*, 424 U.S. 669, 676, 96 S.Ct. 1189, 1194 (1976).

**B. Economy and efficiency dictated that the discrimination question be tried in the Southern District Court.**

That the Southern District Court had jurisdiction of both the subject matter and of the parties is not questioned. The case was not one of lack of jurisdiction. The best the Fifth Circuit could muster was a conclusion that:

"By enjoining the TEA from following the order (of the Eastern District Court), the Southern District seriously interfered with the power of the Eastern District Court to maintain the integrity of the order." (Appendix, p. 41)

In all likelihood, this misapprehension by the Court of Appeals accounts for its erroneous disposition of the case. Since a transgression of constitutional rights is a condition precedent to the imposition of federal sanctions in school cases, there was no way in which the Southern District Court could "seriously interfere with the power

of the Eastern District Court to maintain the integrity of the order" if it did nothing more than determine whether the condition precedent existed. That was the only undertaking of the Southern District Court. There was to be no interference. If there was no constitutional violations there was no basis for the imposition of sanctions, and if there were a violation the Southern District Court had already determined and announced that it would not interfere.

The Fifth Circuit attempted to bolster its holding by asserting that "all of plaintiff's constitutional challenges could have as easily been made in the Eastern District." (Appendix, p. 41) Significantly, this statement is sans supporting factual recitations. It is not the case. The Court may judicially notice that Texas is a large state and that Corpus Christi and Tyler are far removed from one another. All of the parties and evidence necessary to determine whether Gregory-Portland had discriminated against Mexican-Americans were located in the small communities of Gregory and Portland, only seven miles from Corpus Christi, the site of the Southern District Court, but 412 miles from Tyler, the home of the Eastern District Court. The School District's attorneys are from Corpus Christi, the attorneys for the TEA are from Austin, Texas, and the attorneys for the United States are from Washington, D.C. Austin is 194 miles from Corpus Christi and 226 miles from Tyler. Both Corpus Christi and Tyler are equally inaccessible from Washington. How would a trial in Tyler be easier? The Fifth Circuit does not say. All of the evidence in the record is to the contrary. Gregory-Portland, the individual plaintiffs, all witnesses and documentary evidence, and counsel

for the plaintiffs were located within the Corpus Christi Division, where venue clearly lay [28 U.S.C. § 1391(b)]; and there are many school districts in other federal court districts and divisions of the State of Texas which have large Mexican-American populations, and which are even farther from Tyler than is Gregory-Portland.

**C. The Eastern District Court's order which provoked the instant suit was based upon a standard which this Court has condemned.**

In addition to the lack of a jurisdictional prerequisite to the intervention by the Eastern District Court in Gregory-Portland's student assignment, there was an additional fatal shortcoming in that Court's TEA-transmitted edict. The standard by which a school district was to be judged, and which any plan submitted to avoid swift loss of accreditation and funds must meet, was a flat and inflexible 66%. Though perhaps not strictly pertinent here, the Eastern District Court's order in this respect further demonstrates the injustice visited upon petitioners. Absence of constitutional violations was immaterial. If there were more than 66% minority students at a given school, the alternatives were reassignment or (if the Fifth Circuit's opinion is allowed to stand) travel to Tyler to seek relief, i.e., assume the burden of proof, and assume it in a forum so distant that the inconvenience and expense, including the inability to subpoena witnesses [Fed. Rule of Civil Procedure 45(2)], makes bearing the burden more difficult.

The genesis of this inequity is the Eastern District Court's refusal to heed still another well-established legal principle. There is no presumption that a large Mexican-

American enrollment at a school establishes the existence of past or present unconstitutional segregation, *ipso facto*. The existence of a high minority enrollment at one of the five schools within the Gregory-Portland Independent School District is no evidence whatsoever of a constitutional violation. *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924, 84 S.Ct. 1223 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914, 85 S.Ct. 898 (1965); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (1st Cir. 1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. den. 389 U.S. 847, 88 S.Ct. 39 (1967); *Offermann v. Nitkowski*, 378 F.2d 22 (2nd Cir. 1967).

Nor does the Eastern District Court's 66% yardstick rectify the erroneous shifting of the burden of proof. Inflexible ethnic or racial student ratios have been uniformly rejected by the federal courts as a constitutionally guaranteed right in the first instance, *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. 1, 91 S.Ct. 1267, or as a prescribed remedy for elimination of discrimination already established to exist. See *Cunningham v. Grayson*, 541 F.2d 538 (6th Cir. 1976), cert. den. 429 U.S. 1074, 97 S.Ct. 812 (1977)—inflexible ratios held an abuse of discretion; *Harrington v. Colquitt County Board of Education*, 460 F.2d 193 (5th Cir. 1972), cert. den. 409 U.S. 915, 93 S.Ct. 238 (1972), and *Brewer v. School Board of City of Norfolk, Va.*, 456 F.2d 943 (4th Cir. 1972), cert. den. 406 U.S. 933, 92 S.Ct. 1778 (1972)—ratios may be used as a starting point only. The Eastern District Court did not use the 66% standard as a starting point only. Failure to meet the standard at the outset, or to implement a plan

which would, brought suspension of funds and accreditation. Proof of discrimination was not a prerequisite to the imposition of sanctions. The shoe was automatically on the other foot. If a school district exceeded the Eastern District Court's 66%, it had to *disprove* discrimination in Tyler to recover what was otherwise automatically to be taken from it.

A school district is not required to prove that it has not discriminated. On the contrary, the burden is on him who contends that unlawful discrimination has existed. And when the question is presented, intent to discriminate, not statistics, is the proof required. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976); *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686 (1973).

The substantive shortcomings in the orders of the Eastern District Court, gross as they are, are not the crux of the present petition, however. They simply exacerbate the unreasonableness of the Fifth Circuit's decision that after a trial on the merits in a convenient forum, this case must now be tried again. The result is unfair in the extreme. In this day of crowded dockets, when litigants justly complain of the law's delay and the tremendous expense incident to litigation, there is no justification for a court order which imposes on non-parties to the litigation in which an order was entered, the burden of seeking relief in a far-distant court from a sanction based upon an insupportable legal basis—the presumption that a large Mexican-American enrollment establishes the existence of unlawful segregation.

**D. There is no legal precedent for the vacation of the Southern District Court's orders by the Court of Appeals at the instance of a non-party.**

The United States found itself in difficult straits in its quest for a petition for writ of mandamus or of prohibition because it was not a party to the suit. A different panel of the Fifth Circuit noted that it could find no precedent for the granting of such a writ to one not a party to the litigation. *United States v. United States District Court*, 506 F.2d 83 (5th Cir. 1974) (Appendix, p. 11).

The United States was in no different posture before the Fifth Circuit on its appeal following the Southern District Court's trial of the discrimination case on its merits and its refusal of the United States' petition for leave to intervene. Leave to intervene has not been granted by any court to this very day. As the matter stands, the Fifth Circuit vacated the orders of the Southern District Court at the instance of a mere bystander. Although petitioners have found no case in which the impropriety of such action has been discussed, the United States, as it appeared before the Fifth Circuit, was not a party to the suit, and "only parties to a decree can appeal." *Farmers' Loan & Trust Co. v. Waterman*, 106 U.S. 265, 269, 1 S.Ct. 131, 134 (1882). Since the United States was not a party to the suit on its merits and did not have standing to appeal to this Court from an adverse ruling of the Fifth Circuit, it is difficult to understand how it had standing to obtain a ruling at all.

In short, leave to the United States to intervene was as much a prerequisite to the Fifth Circuit's vacation of the Southern District Court's judgment on the merits as

was a violation of constitutional rights to the TEA's suspension of Gregory-Portland's accreditation and state funds. The Fifth Circuit erred in directing the Southern District Court to dismiss the case on its merits, and compounded that error by ordering the dismissal at the instance of one not a party to the suit at the trial or appellate level.

### CONCLUSION

For the reasons set forth above, it is respectfully prayed that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

RICHARD A. HALL  
J. W. GARY  
100 Hawn Building  
Corpus Christi, Texas 78401

By: \_\_\_\_\_  
*Attorneys for Petitioners*

### CERTIFICATE OF SERVICE

This is to certify that on Decembr 15, 1978, three copies each of the foregoing Petition for Writ of Certiorari and the Appendix thereto were served upon the Texas Education Agency and the United States of America by depositing each set of copies in a United States Post Office, with first class postage prepaid, properly addressed to counsel of record as follows:

Hon. J. Stanley Pottinger,  
Assistant Attorney General of the United States  
Department of Justice,  
Washington, D.C. 20530.

Hon. Roland Allen,  
Assistant Attorney General of the State of Texas,  
Post Office Box 12548 Capitol Station,  
Austin, Texas 78711.

Hon. Wade H. McCree, Jr.,  
Solicitor General of the United States,  
United States Department of Justice,  
Washington, D.C. 20530.

\_\_\_\_\_  
RICHARD A. HALL

Supreme Court, U. S.  
FILED

DEC 18 1978

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1978

NO. 78-985

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL.,  
*Petitioners*

v.

TEXAS EDUCATION AGENCY, ET AL.,  
*Respondents*

UNITED STATES OF AMERICA,  
*Applicant for Intervention*

**APPENDIX  
TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

RICHARD A. HALL  
J. W. GARY  
100 Hawn Building  
Corpus Christi, Texas 78401  
*Attorneys for Petitioners*

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IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

---

CIVIL ACTION NO. 73-C-175

---

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL

v.

TEXAS EDUCATION AGENCY  
AND J. W. EDGAR

---

ORDER GRANTING PRELIMINARY INJUNCTION

On January 18, 1974, there came on to be heard in the above cause the plaintiffs' Motion for Preliminary Injunction and the defendants' Motion to Dismiss for Want of Jurisdiction, at which time the Court heard evidence and argument of counsel. The defendants' Motion to Dismiss for Want of Jurisdiction is currently under consideration by the Court. Meanwhile, due notice having been given to defendants, and taking into account the evidence and stipulations of fact entered into by all of the parties in open court, the Court finds the following:

(1) By letter dated November 5, 1973, the Central Education Agency (Texas Education Agency), acting through J. W. Edgar, Commissioner of Education, notified the Gregory-Portland Independent School District that unless the Gregory-Portland Independent School Dis-

trict would consent to a reassignment of elementary students attending its three elementary schools in a manner specified by the Central Education Agency or in a manner proposed by the Gregory-Portland Independent School District and approved by the Central Education Agency, the Central Education Agency would suspend the school district's accreditation with the Central Education Agency and, in addition, would suspend the payment to the Gregory-Portland Independent School District of all state funds granted to the district under the state Minimum Foundation Program.

(2) The proposed suspension of accreditation and funds was to take effect fifteen (15) days after the commencement of the Spring, 1973-74 school semester, which semester commenced in January of 1974. The basis of the proposed suspension of accreditation and funds by the Central Education Agency is the alleged existence in the Gregory-Portland Independent School District of current or past discriminatory practices which violate the United States Constitution or the district's refusal to eliminate vestiges of such past discriminatory practices. The school district and the individual plaintiffs herein deny the existence of any such discriminatory practices or vestiges thereof.

(3) It has been stipulated and the Court finds as a fact that at no time before the filing of the instant suit were the Gregory-Portland Independent School District or the individual plaintiffs herein notified of any claim or contention by the Central Education Agency that discriminatory practices or vestiges thereof existed in the Gregory-Portland Independent School District nor were any of the plaintiffs afforded a specification of the alleged

practices or vestiges, or of the evidence claimed to support the existence thereof, or an opportunity to appear and present evidence refuting the contentions.

(4) No evidence has been presented to the Court which suggests that the Gregory-Portland Independent School District is or has been engaged in discriminatory practices in contravention of the United States Constitution or that vestiges of any alleged past discrimination still exist. Such evidence as was presented suggests to the contrary.

(5) A large percentage of the funds necessary to operate the Gregory-Portland Independent School District is derived from state funds granted to the district under the Minimum Foundation Program. Suspension of the district's accreditation with the Texas Education Agency would work a hardship upon students who transfer out of the district or who graduate during the course of the suspension in that difficulty is experienced in transferring credits for completed work from a non-accredited school to an accredited school and credits for work completed by a student at a non-accredited school are not readily accepted by many colleges in connection with application for admission.

(6) The Gregory-Portland Independent School District has satisfactorily complied with all requirements for accreditation with the Central Education Agency and is entitled to such accreditation and to receive state funds pursuant to the Minimum Foundation Program, unless it should ultimately be determined that the Gregory-Portland Independent School District has engaged or is engaging in discriminatory practices violative of the

United States Constitution or has refused to eliminate vestiges of past unconstitutional discrimination.

(7) The contentions raised by the parties in this proceeding with respect to alleged discrimination on the basis of race, color, or national origin do not relate to segregation or discrimination as between Negro and white children. There are currently only two Negro children who reside and are eligible to attend school within the Gregory-Portland Independent School System. There is no contention made of discriminatory practices with respect to Negro children. Any claimed constitutional violation by the Gregory-Portland Independent School District relates solely to children with Mexican surnames.

Accordingly, it is ORDERED, ADJUDGED and DECREED that pending further order of this Court, the defendants Central Education Agency (Texas Education Agency) and J. W. Edgar, Commissioner of Education, their respective officers, agents and representatives, be and they are hereby restrained and enjoined from suspending the accreditation of the Gregory-Portland Independent School District with the Central Education Agency and from suspending payment to the Gregory-Portland Independent School District of any state funds granted to the Gregory-Portland Independent School District under the Minimum Foundation Program.

It is further ORDERED, ADJUDGED and DECREED that this order shall be effective from and after 4:00 p.m., January 18, 1974.

It is further ORDERED, ADJUDGED and DECREED that the plaintiffs herein file a joint bond, with corporate surety, to be approved by the Court, in the

sum of One Thousand Dollars (\$1,000.00), conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

DATED at Corpus Christi, Texas, the 24th day of January, 1974.

/s/ OWEN D. COX  
United States District Judge

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

---

C.A. NO. 73-C-175

---

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL,

v.

TEXAS EDUCATION AGENCY and  
DR. J. W. EDGAR, COMMISSIONER  
OF EDUCATION

---

MEMORANDUM

Gregory-Portland Independent School District and the members of its Board of Trustees, Plaintiffs, have brought this action against the Texas Education Agency and J.W. Edgar, to enjoin them from suspending the accreditation of, and the distribution of funds to, the said School District. Plaintiffs also sue as representative parties for the class or classes of the adult residents and taxpayers and their children who are in attendance at public schools within the District, under Rule 23, Federal Rules of Civil Procedure.

Plaintiffs also ask for a declaration by this Court that the District has not acted so as to violate any right guaranteed to any resident of the District under the laws or the Constitution of the United States.

A preliminary injunction was granted on the 24th day of January, 1974, and it remains in effect. Thereafter, a hearing was held on the Defendants' motion to dismiss this action for want of jurisdiction.

At this hearing, the Defendants took the position that the challenged actions were taken pursuant to the mandatory injunction issued by the United States District Court for the Eastern District of Texas, Tyler Division, as amended by court order of August 9, 1973; and that any action seeking relief from the effects of such order must be pursued in the Tyler court. If their contention is valid, this cause should be dismissed.

Subsequent to the hearing on jurisdiction, the United States has sought and been granted permission to file an amicus curiae brief, in which it supports the contention of Texas Education Agency and Mr. Edgar that no jurisdiction exists for this action in the Southern District of Texas, Corpus Christi Division.

Plaintiffs respond by arguing that they seek to determine whether or not the Texas Education Agency has followed Section F of the Tyler court's August 9, 1973, order, in its reassignment of students within the Plaintiff District, under existing circumstances. Plaintiffs cite *United States v. State of Texas*, 356 F.Supp. 469 (E.D. Tex. 1972), in which a state court action, which attempted to restrain a school board from carrying out the Tyler court's desegregation order, was enjoined. The language of Judge Justice, in his opinion, left the door open for a United States District Court, with venue, to proceed as Plaintiffs are doing here. He said:

"Nor does this Court's decision reach the merits of the decision made by the Commissioner on these

particular transfers. Whether the Commissioner properly carried out Section A(1) of this Court's order in *United States v. Texas, supra*, may properly be aired in a federal district court if and when such challenge is asserted." (At 472.)

This statement, says the Plaintiffs, is dispositive of the issue now before the Court.

In this case, so far as the allegations of the Plaintiffs reflect, the Defendants have made a determination that the constitutional rights of the minority residents of the Gregory-Portland Independent School District have been contravened; that is, that those residents are being unconstitutionally segregated and discriminated against by the elementary-pupil assignments of said School District. This determination was apparently made *ex parte*, without any sort of hearing during which the School District could present facts and give the Commissioner the benefit of its interpretation of those facts. And, following such determination, the School District was advised that the distribution of funds to it and accreditation would be terminated. This action by the Texas Education Agency and the Commissioner may have refused the District due process. In any event, we are concerned if the Commissioner has properly carried out Section A(1) of the order of the Tyler court.

It is not reasonable to assume that Judge Justice intended for the Texas Education Agency to act *ex parte* in all its determinations, relegating the local school districts to the Tyler court for relief after the fact, no matter the miles to be traveled and the money to be spent. Venue has certainly not been destroyed by the Tyler court order. So, we believe due process and venue

combined give these Plaintiffs the right to a full hearing, so as to defend against charges of unconstitutional segregation, in their own back yard. The following language of the Tyler court,

"(2) Nothing herein shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suit."

indicates as much.

Plaintiffs, in the Southern District of Texas, Corpus Christi Division, have said, "We want a declaratory judgment that we are not segregating minority students," and the Texas Education Agency, in order to uphold its position, necessarily is the adversary and should have some responsibility to support its prior *ex parte* decision and the propriety of the sanctions it here hopes to impose. This proceeding is, in effect, a desegregation suit, and it is brought subsequent to July 13, 1971.

This Court does not purport to contravene the Tyler order, but says that the Texas Education Agency has no right, under the Tyler order or any other order, to impose the sanctions it proposes without a proper finding of the existence of unconstitutional segregation. Without such a finding, there is no fault in the School District. Since this Gregory-Portland School District, by this action, says there is no basis for such a finding and asks for a declaration to that effect, they are bringing, in reverse, such a segregation suit as is excluded from the operations of the Tyler order. The issues will be generally the same as if minority residents had sought relief from the School District because of unconstitutional segre-

gation, although, perhaps, the burden of proof may be on a different party.

The Court concludes that it has jurisdiction and venue to determine the facts and draw its own conclusions of law as to whether or not there is existing unconstitutional segregation in this School District. If such exists, then Texas Education Agency would be entitled to enforce its sanctions, if same are proper, and any relief which the District might want from the sanctions of the Texas Education Agency would, necessarily, have to be gotten from the Tyler court. But, if for some unforeseen reason the Plaintiffs are being deprived of due process, this Court should not retreat from their protection in that regard.

The motion to dismiss this action for want of jurisdiction should be denied. A separate judgment will be prepared and signed by this Court.

Signed this 28th day of February, 1974.

/s/ OWEN D. COX  
United States District Judge

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF TEXAS, Respondent.

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NO. 74-2480.

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United States Court of Appeals,  
Fifth Circuit.

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December 30, 1974.

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Original Petition for Writ of Mandamus or Writ of Prohibition.

Before BROWN, Chief Judge, and RONEY and GEE,  
Circuit Judges.

ORDER:

The request for a writ of mandamus or a writ of prohibition is denied.

The alternative petition of the United States of America requests either

(1) a writ of prohibition ordering the District Court for the Southern District of Texas to dissolve a preliminary injunction issued by Judge Owen D. Cox in the case of Gregory-Portland Independent School District et al. v. Texas Education Agency et al., C.A. No. 73—C—175 (S.D. Tex.) and to dismiss that suit, or

(2) a writ of mandamus directing that court to transfer that case under 28 U.S.C.A. § 1404(a) to the District Court for the Eastern District of Texas (Tyler Division).

The Eastern District Court is presently exercising continuing supervision of the desegregation injunction entered in *United States v. Texas*, 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235 (E.D. Tex.), modified, 447 F.2d 441 (5th Cir.), cert. denied, 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663 (1972).

While the Texas Education Agency is a party defendant in both the Southern District suit and the Eastern District suit, the United States is not a party to this suit which it seeks either to prohibit or to transfer to the Eastern District Court where it is a party defendant.

[1, 2] Traditionally mandamus has been available only to confine an inferior court to a lawful exercise of its prescribed jurisdiction. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). It is not to be used as a substitute for appeal. *Ex parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). This is so even though hardship may result from delay or a perhaps unnecessary trial. The writ is appropriately issued when there is a usurpation of judicial power or a clear abuse of discretion. *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953). The power to issue the writ is discretionary and is sparingly exercised. It is a drastic and extraordinary remedy and is reserved for really extraordinary causes. *Parr v. United States*, 351 U.S. 513, 76 S.Ct. 912, 100 L.Ed. 1377 (1956).

[3, 4] We deny the extraordinary relief here requested for two reasons. *First*, we have found no authority, nor has any been cited to us by the United States, which would allow a non-party standing to seek a writ of mandamus or prohibition in circumstances such as presented in this case. *Second*, even if standing existed, we do not believe that the government has shown a "clear and indisputable" right to the extraordinary writ. See *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967). The Southern District Court has expressly disavowed any intent to contravene the mandate in *United States v. Texas*, the suit pending in the Eastern District. The two cases need not inevitably be in conflict, and, thus, we do not see where our supervisory intervention into the district court proceeding is required.

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

---

C. A. NO. 73-C-175

---

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL

v.

TEXAS EDUCATION AGENCY, ET AL

---

MEMORANDUM  
and  
ORDER

By this suit, the Gregory-Portland Independent School District and members of its Board of Trustees seek to enjoin the Texas Education Agency and its Commissioner from requiring the School District to implement certain student reassignment plans under the penalty of losing state funding and school accreditation. The Court has granted a preliminary injunction in this case and is now prepared to make it permanent.

The individual Plaintiffs who joined the Gregory-Portland Independent School District (hereinafter School District), in bringing this suit in December of 1973, were citizens who resided in and paid taxes to said District; and, also were members of the Board of Trustees of that School District. All but one of such Plaintiffs had minor

children attending the District's schools, and such children appeared through their respective parents. These citizens were alleged, at the time the suit was filed, to be representative parties on behalf of other adult residents and taxpayers of the School District, and their children, as a class. Among these named class representatives were persons of both Anglo-American and Mexican-American ancestry. There has been no appreciable change in the status of these Plaintiffs since suit was filed.

The Defendant Texas Education Agency (hereinafter TEA) is empowered under state law to administer and distribute state funds to the various independent school districts around the state and to grant or deny accreditation to those same school districts. Defendant J. W. Edgar is Commissioner of Education and Chief Administrative Officer of TEA.

The American G.I. Forum and League of United Latin American Citizens, on the 28th day of March, 1974, filed a joint motion to intervene herein. No individual citizen was named in said motion as complaining about segregated treatment within such School District, and no citizen who resided in the School District was named by said organizations as an intervening party. Tendered for filing by said organizations were a motion to dismiss the suit of said School District and what is titled "Answer in Intervention." Neither the motion to intervene nor the tendered pleadings set forth any facts which indicated that proof of the existence of segregation or discrimination, either *de facto* or *de jure*, could be produced. The bare defensive conclusion that segregation existed in the School District, without more, did not justify their intervention. Consequently, the Court denied the bid of said

organizations to intervene. Nothing further was heard from them, although the Court's order at the time gave adequate hints as to how they could become effective parties in the lawsuit. This Court's reaction, at the time, was that these two organizations had no complaints to act upon, had not conducted any sort of *ex parte* investigation to determine the existence of complaints, and did not know if the school system was a segregated one or not.

The origin of this suit lies in an order of the United States District Court for the Eastern District of Texas in a case styled *United States of America v. State of Texas, et al*, 321 F.Supp. 1043 (E.D. Tex. 1970), 330 F.Supp. 235 (E.D. Tex.), modified 447 F.2d 441 (5th Cir.), *cert. denied*, 404 U.S. 1016 (1972); amendment to order filed E.D. Tex., August 9, 1973. While the history of that litigation is too extended and tedious to warrant thorough discussion here, it suffices to say that on the date this suit was filed, the Defendant Texas Education Agency was bound by the particulars of the District Court's order of July 13, 1971,<sup>1</sup> in the above entitled cause (hereinafter identified as Order), as amended August 9, 1973<sup>2</sup> (hereinafter identified as Amendment). The Court, in that case, stated that the duty of the state was,

"First to act at once to eliminate by positive means all vestiges of the dual school structure throughout the state; and, *second*, to compensate for the abiding scars of past discrimination." Order, July 13, 1971, p. 2.

1. Defendants' Exhibit #2.

2. Defendants' Exhibit #3.

The Tyler Court gave the TEA very specific instructions on how it was to proceed in eliminating a dual school system in school districts across the state. With regard to student assignments, Section F(3) of the July 13, 1971, Order provided that TEA must identify the school districts containing a minority student population in excess of 66% of the total<sup>3</sup> and then make a determination "whether or not the student plans in these districts resulted in compliance with federal constitutional standards." The July 13, 1971, Order did not require TEA to force upon any individual school district the adoption of a plan to comply with constitutional standards. TEA was required, however, to report to the Court and others what efforts those school districts with ethnically identifiable schools were making to eliminate them and what recommendations TEA had proposed to aid these school districts in their efforts.

The August 9, 1973, Amendment to Section F(3) markedly changed TEA's responsibility in terms of requiring the various school districts across the state to come into compliance with the intent of the Tyler Court's July 13, 1971, Order. The TEA and its Commissioner were required to provide school districts with a specific and detailed plan for complying with the Tyler Court Order and if the school district did not implement this plan, or one equally effective, the Defendants were under a mandatory duty to suspend the errant school district's accreditation and to simultaneously suspend payment of all funds granted to this district under the Minimum Foundation Program. Paragraph F(4)(5). These sanctions were to be imposed against districts failing to "eliminate

3. Part II(E)(6).

nate all racially or ethnically identifiable schools found to be in violation of constitutional standards, as provided by paragraph F(3)." Paragraph F(4).

It was against this legal background that TEA acted in the case of the Gregory-Portland Independent School District. On November 5, 1973, the Commissioner of Education wrote the President of the Board of Education of the School District, informing him that it was TEA's position that the existence of Austin Elementary School, with a 92.37% minority student enrollment, and T. M. Clark Elementary and East Cliff Elementary, with small minority enrollments, constituted a violation of the Tyler Court's Order.<sup>4</sup> The TEA suggested that the School District adopt one of two possible plans for eliminating Austin Elementary School as a racially identifiable school or develop their own plan. In any event, a plan acceptable to TEA was to be implemented at the beginning of the next semester or TEA would be compelled to impose the sanctions set out in Paragraph F(4) and (5). The Defendant School District was given no opportunity to contest the TEA's finding that the conditions then existing in its School District violated the Tyler Court's Order. By letter dated November 30, 1973, the President of the Board of Trustees of the School District informed the TEA that they did not feel bound by the order of the Tyler Court and therefore would not implement any plan for reassignment of its District's students. The President stated that it was his opinion that the School District had at no time participated in any unconstitutional discrimination.<sup>5</sup> The School District came into the United

4. Plaintiff's Exhibit #1.

5. Defendants' Exhibit #1.

States District Court for the Southern District of Texas, seeking preliminary relief against the impending loss of accreditation and loss of state funds as a result of TEA action. On January 24, 1974, this Court granted the Gregory-Portland Independent School District a preliminary injunction against the Texas Education Agency and its Commissioner, J. W. Edgar.

The United States of America is not a party to this suit, nor has it sought to intervene herein, although counsel for the government sat silently through the hearing on the temporary injunction which is now in effect. Nevertheless, and we assume that since the government was, and is, a party to the Tyler Court's suit, it hoped to control this litigation by seeking to have the United States Court of Appeals for the Fifth Circuit issue a writ of mandamus or a writ of prohibition with regard to this Court's preliminary injunction and the continued maintenance of this proceeding in the Corpus Christi Division. These petitions were denied and the Fifth Circuit commented,

"The Southern District has expressly disavowed any intent to contravene the mandate in *United States v. Texas*, the suit pending in the Eastern District. The two cases need not inevitably be in conflict, and, thus, we do not see where our supervisory intervention into the district court proceeding is required." *United States v. U.S. District Court, Southern District of Texas*, 506 F.2d 383 (5th Cir. 1974).

This Court believes this language supports its position that a Court sitting in close proximity to the questioned school district can and should hear and decide the ques-

tion whether that school district has acted in an unconstitutional manner. See *United States v. Georgia*, 466 F.2d 197 (5th Cir. 1972); *United States v. State of Texas*, 466 F.2d 518 (5th Cir. 1972), 509 F.2d 192 (5th Cir. 1975).

This Court in this case is seeking only to determine whether the School District has acted in a constitutionally impermissible manner in assigning its students. If it has, then the mandate of the Tyler Order is binding on TEA and the School District now before this Court. In any case, this Court believes each school district so threatened by a loss of accreditation and a withdrawal of funds ought to have a right to a determination of whether they acted in an impermissible manner prior to the exercise of the sanctions. The existence of unconstitutional conduct on the part of the School District must be a prerequisite to any action under the Tyler Court's Order.

Arbitrary minority-majority ratios which are in no way based upon fact findings as to the historical and background information of a particular school district should not constitute *prima facie* evidence of either segregation or discrimination in any school system. Such ratios may be enough to cause the TEA to review the situation, but that agency should have to establish, by facts based upon competent investigation, segregation before depriving the School District of any state funds or loss of accreditation. It does not comport with our system of due process that a school district can be cut off from public funds because an arbitrary minority-majority ratio has been established.

The central question for this Court's consideration is whether the ethnic makeup of the School District's three elementary schools for the school year 1973-1974 was a result of intentional action on the part of the School District in contravention of the Fourteenth Amendment. This is not a case where a segregated condition exists in schools which were once a part of a statutorily mandated dual system, and therefore in this case there is no automatic duty upon the state to effectuate an automatic transition to a racially nondiscriminatory school system. *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II). In fact, in the years 1950-1951, when the consolidation of the Gregory Independent School District and the Portland Independent School District into the present School District came about, both Districts had sizable percentages of Mexican-Americans in *all* of its schools.<sup>6</sup> There is no basis in fact in this lawsuit upon which we can say this situation is the result of restrictive covenant in deeds to land, or in restrictions governing residential subdivisions. As in most suits of this sort, there is no significant conflict as to the physical and statistical facts here. The Court considers all such facts are before it. As there is no background of *de jure* segregation here, a finding that the School District has maintained a segregated system must be predicated on evidence that the School District has, through its policies, carried out an intentional and systematic program of segregation. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

Since "intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the

6. Plaintiff's Exhibit #2.

operations of the human mind," as we tell criminal juries, the School District should be allowed to rebut the *prima facie* case of segregation by affirmatively establishing that any facts which appear segregative in no way contributed to the segregated condition now existing in the School District, to wit, a school with an overwhelming percentage of minority (Mexican-American) students. *Id.*, at 211. The Court need not decide whether the School District has met this latter burden of proof because it is the opinion of the Court that the Plaintiffs have presented sufficient evidence to prove that the School District has not conducted itself in a manner which indicates segregative intent on its part against any of the children, Mexican-American or Anglo-American, in its care.

The history of the Gregory-Portland Independent School District belies any claim that the District has followed a policy of purposeful segregation. In October of 1950, a majority of the voters in each of the then Gregory Independent School District and the Portland Independent School District voted for consolidation of these districts.

At the time, both districts, some 4 to 4-1/2 miles apart, center to center, were basically rural farming areas with no residential areas. The Board of Trustees of what is now known as the Gregory-Portland Independent School District succeeded to two educational facilities operating in the following manner: the Gregory Independent School District consisted of four buildings, a high school housing grades 6-12, a single grade school housing grades 1-5, a gym, and a vocational/agricultural building. The ethnic makeup of the elementary students (grades 1-8) in the Gregory School District at the time

was approximately 76% minority. In the high school grades (9-12), the minority percentage was approximately 20%. The Portland Independent School District consisted of a single elementary school (grades 1-7) which was approximately 37% minority students. There was no Portland high school and students in those grades were given the option of attending the Gregory High School, Taft High School, or Corpus Christi High School. All the schools which were combined to make up the Gregory-Portland Independent School District were attended by both Anglos and Mexican-Americans sharing the same facilities. There is no evidence, at least in this record, that the children of either group were treated specially.

In the year immediately following consolidation, the School District continued to maintain the two elementary facilities in basically the same manner as before. There was no reassignment of students in these grades and the ethnic ratios in each school remained approximately the same. On the high school level, all students were sent to a single facility in Gregory. Those students from the former Portland district who had begun their secondary education elsewhere were given the option of returning to the new consolidated high school or permanently transferring to the school of their present attendance. All students leaving the eighth grade were required to attend the consolidated high school. The high school had an ethnic enrollment of about 35% minority. During this year following consolidation, construction was begun on the Reynolds Metals Company Plant, a large industrial complex which was to bring substantial numbers of people into the District.

During the school year 1953-1954, construction was completed on two new elementary school facilities for

the School District. In October of 1953, T. M. Clark Elementary School opened to serve a zone encompassed within the old Portland Independent School District. This school housed grades 1-8 and had an ethnic minority enrollment of about 38%. Soon thereafter, in February of 1954, Austin Elementary School opened. This school, likewise, housed grades 1-8 and served a zone encompassed within the old Gregory Independent School District. It opened with an ethnic minority enrollment of 85%. These schools were substantially similar in construction and furnishings save that Austin had some additional capacity. Superintendent Andrews testified that the Board, in deciding to replace these facilities, did not concern themselves with what ethnic minority enrollment might result in the schools, nor did it consider building an elementary school somewhere along the four to four and one-half mile stretch between the two towns. During the first years following construction of these new facilities, there was a small decline in the ethnic minority enrollment percentage in both schools.

At the beginning of the 1958-1959 school year, a new addition on the T. M. Clark campus was opened as a junior high school. All seventh and eighth graders from Clark and Austin were reassigned to this facility. The junior high school had an ethnic minority enrollment of 54%. Under the School Board's policy, the seventh and eighth graders from Austin found themselves going to a new school with an appreciably higher percentage of Anglos than before, and the seventh and eighth graders from Clark were going to a new school with an appreciably higher percentage of Mexican-Americans than before. It should be pointed out that in October of 1959, the Harbor Bridge was completed and one side

of the present Nueces Bay Causeway also was completed about that time, giving residents of Portland easy access to the heart of the Corpus Christi business district. This event has undoubtedly marked the beginning of an appreciable demographic change in this area. The City of Portland began to grow rapidly. Located only minutes from downtown Corpus Christi, it became for many people a seaside suburb of this city. It was about as close to the downtown area as many of Corpus Christi's southside and far westside neighborhoods. The division of the City of Portland became more definite when the present four-lane freeway (U.S. 181) was completed in 1970. The population of Gregory, however, stayed fairly constant.

As Portland grew and the need arose, the School Board decided to build a second elementary school there. In 1962, East Cliff Elementary opened on a site east of U.S. Highway 181, which, at that time, was a wide, two-lane highway, and divided Portland almost in half. At the time, East Cliff was on the edge of town, but it was the opinion of the Board that the residential areas would expand in that direction. When it opened its doors, it had an ethnic minority enrollment of only 13%. By the time the school had reached full operation the following year, this percentage had dropped to some 7%. Students were assigned to East Cliff or Clark on the basis of residence, with Highway 181 being the dividing line. This assignment of students was modified to some extent to allow some students south of East Cliff and east of Highway 181 to attend Clark, if they wished, because it was physically closer than East Cliff. Generally speaking, now all the children in this area go to East Cliff. The year after East Cliff opened, the ethnic enroll-

ment in Austin was 82%, and in Clark it was some 23%.

In 1965, the School District substantially changed its program on the secondary level. A new high school facility was opened at a point almost equidistant between the two cities. This school opened its doors with an ethnic minority enrollment of some 35%. The old high school in Gregory was converted into a facility for eighth graders from the whole district and had a beginning ethnic minority enrollment of 36%. The seventh graders attended school in the junior high school in Portland and ethnic minority enrollment was 34%. It wasn't until 1968 that the District reunited the seventh and eighth graders in the same buildings. In that year, a new junior high school facility was constructed and opened at a site near the high school. This junior high school had in its first year an ethnic minority enrollment of 36%. All students residing within the District attend this junior high school.

The record before the Court in this case shows no discrimination against the School District's ethnic minority in other areas of school life. Apparently all students are permitted and encouraged to participate on athletic teams and in extracurricular activities. The School District might be subject to some criticism for having failed to hire appreciable numbers of Mexican-American teachers until the late 1960's, in comparison to the percentage of ethnic minority students attending the schools. It does now appear that the District is making strides to hire more such teachers, a trend which this Court expects will continue. These teachers have been assigned to schools throughout the District.

The Court is convinced, on the evidence presented in this record, that the condition existing in Austin Elementary School was not the result of School District policies motivated by segregative intent. At the time of its consolidation, the Gregory Independent School District was predominantly, but by no means completely, Mexican-American in the primary grades. With the passage of twenty-five plus years, the minority predominance has become slightly more pronounced in this area (served now by Austin Elementary School) but this was not the result of any action by the School District. The elementary schools are and have been town-oriented and the racial composition in them reflects the town's particular history. Significantly, on the secondary level, the School District, through consolidation and its student-assignment policies over the years, has commendably maintained a completely integrated school system.

The Court finds that a permanent injunction should issue against the Texas Education Agency, and J. W. Edgar. A final judgment setting out the injunctive relief granted will be prepared and entered. A copy of this Memorandum and Order shall be furnished appropriate counsel.

IT IS SO ORDERED.

SIGNED this 30th day of January, 1976.

/s/ OWEN D. COX  
United States District Judge

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

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C.A. NO. 73-C-175

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GREGORY-PORTLAND INDEPENDENT SCHOOL  
DISTRICT, ET AL

v.

TEXAS EDUCATION AGENCY, ET AL

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JUDGMENT

The Court, having considered the evidence, has decided for the reasons outlined in its Memorandum and Order filed this day that the preliminary injunction entered in this case on January 24, 1974, should be made permanent. It is therefore

ORDERED, ADJUDGED and DECREED that the Defendants Central Education Agency (Texas Education Agency) and J. W. Edgar, Commissioner of Education, their respective officers, agents and representatives, and their successors, be, and they are hereby, permanently restrained and enjoined from suspending the accreditation of the Gregory-Portland Independent School District and from suspending payment to the Gregory-Portland Independent School District of any state funds granted to the Gregory-Portland Independent School District under the Minimum Foundation Program in an attempt to enforce the July 13, 1971, order, as amended August 9, 1973, of

the United States District Court for the Eastern District of Texas, in a case styled *United States v. State of Texas, et al*, Civil Action No. 5281.

IT IS SO ORDERED

SIGNED this 30th day of January, 1976.

/s/ OWEN D. COX  
Owen D. Cox  
United States District Judge

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

---

C.A. NO. 73-C-175

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GREGORY-PORTLAND INDEPENDENT SCHOOL  
DISTRICT, ET AL.

v.

TEXAS EDUCATION AGENCY AND J. W. EDGAR

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ORDER

On January 30, 1976, this Court entered a final judgment in this case permanently enjoining the Texas Education Agency and its officials from suspending the accreditation of the Gregory-Portland Independent School District and from suspending payment to the Gregory-Portland Independent School District of any state funds granted to that school district under the Minimum Foundation Program. The Defendant Texas Education Agency brought this suit initially in an attempt to enforce the July 13, 1971, order, as amended August 9, 1973, of the United States District Court for the Eastern District of Texas, in a case styled *United States v. State of Texas, et al.*, Civil Action No. 5281. The United States now seeks leave of Court to intervene, under Rule 24(a)(2) of Rules of Civil Procedure, for the purpose of taking an appeal from the final judgment in this suit. As the Court has in several prior orders outlined the complex procedural history of this case, it will not do so

here, rather it will turn directly to the question of intervention.

Rule 24(a) provides that there shall be intervention of right where the application is "timely" and "(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a *practical matter*, impair or impede his ability to protect that interest, *unless* the applicant's interest is adequately represented by the existing parties." Therefore, to intervene as a matter of right, the United States must demonstrate (1) the timeliness of its application; (2) the existence of a protectable interest in the case in which it seeks to intervene; and (3) an inability to protect such interest, as a practical matter without intervening. See 7A, Wright and Miller, *Federal Practice and Procedure*, §1908 (1972). In support of its motion, the United States asserts that they have a substantial interest in the orderly implementation of the Court's order in *United States v. Texas* and that the judgment in this case impairs that interest. The United States argues that the injunction of this Court is at odds with the decision in *United States v. Texas*, makes for potentially conflicting interpretation of that order, and impedes Texas Education Agency's ability to enforce that order. The United States asserts that Texas Education Agency's failure to take an appeal from this judgment clearly reflects the fact that Texas Education Agency does not adequately represent its interest. It further states that its motion to intervene is timely because it is only an appellate court who can resolve the issue of whether this case was properly heard by this Court or by the United States District Court for the Eastern District of Texas. Having con-

sidered the assertions and the arguments of the United States, the Court has decided, for the reasons outlined below, that the United States has not met the requirements for intervention of right pursuant to Rule 24 (b)(2).

On the issue of the timeliness of the motion to intervene, the Fifth Circuit has taken a jaundiced view of permitting intervention after judgment has been entered, on the valid assumption that such intervention will either (a) prejudice the rights of the existing parties to the suit, or (b) substantially interfere with the orderly processes of the Court. *McDonald v. E. J. Lavino*, 430 F.2d 1065, 1072 (5th Cir. 1970). While the passage of time militates against the granting of intervention, the key issue is whether a grant of intervention will prejudice the existing parties to the suit. *Diaz v. Southern Drilling Co.*, 427 F.2d 1118, 1125-1126 (5th Cir. 1970); *McDonald v. E. J. Lavino*, *supra*; see also *NAACP v. New York*, 413 U.S. 345, 369 (1973).

The United States delayed in excess of two years from the date of filing before seeking to intervene in this case. While such a delay seems plainly excessive, the Court must, as pointed out above, focus on what prejudice might result to the existing parties to the lawsuit if intervention were permitted at this post-judgment stage. The United States has repeatedly involved itself in this suit without taking the final step of actually seeking leave to intervene. It has participated as *amicus curiae* and sought relief by way of mandamus in the Fifth Circuit to present the very question of venue which it now seeks to present on this appeal. The United States undoubtedly caused the Gregory-Portland Independent School District signifi-

cant legal expenses by filing the mandamus proceeding. It watched the Gregory-Portland Independent School District go through the various hearings and trial with the expense those proceedings certainly entailed without at any time trying to intervene. It did not seek to intervene to take an interlocutory appeal when Texas Education Agency's motion to dismiss and/or transfer was denied on March 1, 1974. The Texas Education Agency decided not to appeal that decision, which had the effect of "continuing" an injunction, as might have been its right under 28 U.S.C. § 1292(a)(1), and the United States did not seek to intervene and take that appeal in its stead.

Not only would Gregory-Portland Independent School District be prejudiced by allowing intervention in terms of incurring more legal expenses, an order allowing them to take an appeal at this stage would, if successful, permit the United States to reopen and relitigate the substantive issues, already decided by this Court, and not presently contested by the United States, in contravention of the settled judicial policy favoring the finality of judgments. See *McDonald v. E. J. Lavino*, *supra*, at 1072. The Court believes that the added expense and delay involved in letting the United States intervene at this late date is more than ample prejudice to the School District for finding that the motion to intervene is untimely. The United States has had numerous opportunities to intervene in this case before this date. It cannot be allowed to shout from the sidelines of these proceedings, as it has done here, and then be heard to object to the judgment.

Not only is this motion to intervene untimely, the Court believes that the United States lacks the kind of

impaired interest required by Rule 24(a)(2). To proceed under this rule, the movant must show a "significant protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531 (1971), or, as phrased by the Fifth Circuit, "a direct, substantial, legally protectable interest" in the proceedings. *Diaz v. Southern Drilling Co.*, *supra*, at 1112. A "protectable interest" surely encompasses much more than economic or property interest. Charles Allen Wright cites, with apparent approval, the case of *Smuck v. Hobson*, 408 F.2d 175 (C.A. D.C. 1969), which completely depreciates the concept of "interest" and instead focuses on whether the "concern" of the would-be intervenor is such that to deny him the right to intervene would cause him practical harm and on whether his "concern" is such that none of the parties to the litigation represent his interests. See 7A, Wright and Miller, *supra*, at 508-511. There is a Fifth Circuit case which can be read for the proposition that the intervenor's interest, or concern, which is threatened with impairment, must be substantive rather than procedural. *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1153 (5th Cir. 1975).

The United States has asserted that its "interest" in the case is its interest in assuring the statewide enforcement of *United States v. Texas*. It fears that this Court's decision, taking jurisdiction of this case, will make uniform application of the standards of *United States v. Texas* impossible and will, through the judicial doctrine of *stare decisis*, enable other courts to hear suits which are properly within the jurisdiction of the United States District Court for the Eastern District of Texas under *United States v. Texas*, *supra*. These "interests," in reality, boil down to a single contention: if this Court's decision

in this case stands, the United States believes that its impact will proliferate as precedent to other district courts, depriving the Eastern District of its virtual statewide jurisdiction under *United States v. Texas* to determine the constitutionality of student-assignment plans in all school districts.

The Court doubts whether the United States' alleged interest in this Court's decision, which has nothing to do with the substantive issues of segregation decided by the Court, is a Rule 24 "interest." The United States has made no allegation that the Court erred in finding that Gregory-Portland Independent School District did not engage in purposeful segregative intent in its student-assignment policies. The United States only objects to the fact that this Court made that determination about a local school district instead of the Court for the Eastern District. This is an "interest" in procedures, not in the substance of the question of whether segregation existed in Gregory-Portland Independent School District. See *United States v. City of Jackson, Mississippi*, *supra*.

The Court further believes that denying the United States the right to intervene will not, as a "practical matter," impair its ability to protect its asserted interests. To justify intervention, the movant must show that denial of his right to intervene will, as a "practical matter," impair his ability to protect his interest and that the present parties to the controversy will not adequately defend such interest. The term "as a practical matter" was added to Rule 24 in the 1966 amendments to get away from the naive legalism that grew up under some interpretations of the old rule that held that a person was not impaired in protecting his interest by a court decision unless

he was bound by "res judicata." 7A, Wright and Miller, *supra*, at 514. Several cases have now held that *stare decisis*, by itself, may be sufficient "practical" disadvantage. *Atlantic Development Corporation v. United States*, 379 F.2d 818 (5th Cir. 1967). See also *United States v. City of Jackson, Miss.*, *supra*, at 1151. In *Atlantic Development Corporation*, the Fifth Circuit recognized that the intervening party might be practically affected by the interpretation of the law handed down in that case even though he was not a party to the suit and therefore would not be bound by *res judicata*, and ruled it was important that he be able to assert his opinion of the law.

A finding that the intervenor's rights will be "practically" affected by the Court's decision sets the stage for determining whether his interests are adequately represented by the existing parties. If the Court finds that the would-be intervenor has asserted no interest which might be impaired if he is not permitted to intervene, then the Court need not face the issue of whether Texas Education Agency's decision not to appeal constitutes inadequate representation. Compare *Smuck v. Hobson*, 408 F.2d 175 (C.A. D.C. 1969), and *Spangler v. Pasadena Board of Education*, 427 F.2d 1352 (9th Cir. 1970).

While the Court believes that the United States has not alleged an interest cognizable under Rule 24, given the liberality with which the term "interest" has been defined, see *Diaz v. Southern Drilling Co.*, *supra*, the Court believes the stronger ground for justifying a denial of intervention is a finding that the United States' ability to protect its "interest" will not be "practically impaired"

if the decision of this Court is not appealed. With regard to this particular case, the United States has shown no interest in the particular conditions existing in the Gregory-Portland Independent School District and therefore they apparently have no contention that they have an interest in the substantive issues which they believe will be impaired if this judgment is not appealed. With regard to the statewide effect of this Court's decision on the administration of the procedures under *United States v. Texas*, this decision will have no mandatory effect. The case will not be appealed by Gregory-Portland Independent School District or Texas Education Agency and therefore will produce no appellate decision on the issue of venue under *United States v. Texas* raised by the United States. If another Texas school district seeks to file a declaratory action in the district court in the judicial district in which it is located to stay action by Texas Education Agency under *United States v. Texas*, the United States will have an opportunity to seek intervention in that case at its inception to preserve any procedural interests it may have. The district court hearing the case will not be governed by any mandatory authority on the question and the Fifth Circuit, should the case be appealed, will surely not feel constrained by *stare decisis* to follow any decision of this Court.

For the reasons outlined above, the United States' motion to intervene is denied.

IT IS SO ORDERED.

SIGNED this 14th day of May, 1976.

/s/ OWEN D. COX  
United States District Judge

GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT et al.,  
Plaintiffs-Appellees,

v.

TEXAS EDUCATION AGENCY and  
J. W. Edgar, Defendants,

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United States of America,  
Movant-Appellant.

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No. 76-2926.

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United States Court of Appeals,  
Fifth Circuit.  
July 10, 1978.

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Appeal from the United States District Court for the  
Southern District of Texas.

Before GEWIN, GODBOLD and MORGAN, Circuit  
Judges.

LEWIS R. MORGAN, Circuit Judge:

In this appeal, the United States seeks review of the decision of the district court for the Southern District of Texas denying the government's motion for intervention. Additionally, the government contends that the district court lacked jurisdiction. We hold that the district court should have declined jurisdiction over the case because jurisdiction more properly exists in the Eastern District of Texas.

A little background is necessary for analysis. The United States and the Texas Education Agency (TEA), the State "Board of Education," are currently parties to a suit in the Eastern District of Texas, *United States v. State of Texas*, 321 F.Supp. 1043, 330 F.Supp. 235, aff'd and modified, 447 F.2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663 (1972). The purpose of the *State of Texas* litigation was to force the TEA to carry out its responsibility to diminish racial segregation in schools. By order of the district court in the Eastern District, the TEA was to insure equal education opportunity by refusing to fund and accredit those school districts still discriminating on the basis of race. The orders were affirmed and modified by this court. 447 F.2d 441. The modification provided that the orders of the district court shall not affect the jurisdiction of other courts to entertain desegregation suits aimed at individual local districts.

The instant litigation is directly traceable to a letter sent by the TEA to the Gregory-Portland Independent School District informing the district that its racial make-up was in violation of the court orders in *State of Texas*. The school district was offered plans to conform to the *State of Texas* requirements, but the District refused. The letter ended with the admonition that after a ten-day notice period, accreditation would be lifted and funds withheld if the District did not comply. No ten-day notice was ever issued by the TEA, however.

The District then filed this action in the Southern District claiming that the action of the TEA in terminating accreditation violated due process of the law. The District sought a temporary injunction against TEA, a declaratory judgment that the District had not discrimi-

nated and an order permanently enjoining the TEA from suspending accreditation and disbursement of funds. The court agreed, essentially, and on January 30, 1976 granted claimants relief. On February 14, 1976, the government was informed of TEA's decision to forego appeal. The government then filed its motion for leave to intervene on appeal. Additionally, it challenged the jurisdiction of the Southern District to entertain a suit impinging upon the order of another court. The district court denied the government's motion because the motion was not timely, filed more than two years after the commencement of the suit and because the government did not have a substantive interest in the outcome of the suit. The government then appealed to this court.

Prior to any determination on the intervention issue, it is necessary for the court to satisfy itself that the case was properly heard below. The government contends that any action enjoining the application of the order of the court of the Eastern District should have been brought in that court and no other. Therefore, the government argues, upon filing, the district court for the Southern District should have transferred the action to the Eastern District, or abstained and dismissed the suit. We agree. In *Mann Manufacturing, Inc. v. Hortex*, 439 F.2d 403 (5th Cir. 1971), this court, in a similar situation, held that a district court should defer jurisdiction to another district court if the integrity of that court's continuing injunction jurisdiction is compromised. In *Mann Manufacturing, Inc.*, a New York district court enjoined Mann from bringing a patent action against Goodrich in Texas. Mann nevertheless brought suit in the district court for the Western District of Texas and the Texas court then enjoined Goodrich from proceeding

on its motion in New York. In arriving at its holding that the Texas court should have declined jurisdiction, the court stated, partially quoting from *Lapin v. Shulton, Inc.*, 333 F.2d 169, 172 (9th Cir. 1964), *cert. denied*, 379 U.S. 904, 85 S.Ct. 193, 13 L.Ed.2d 177 (1964):

When a court is confronted with an action that would involve it in a serious interference with or usurpation of this continuing power, 'considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction . . . and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.'

In the instant case, a continuing power over the order prescribing TEA conduct existed in the Eastern District Court. By enjoining the TEA from following the order, the Southern District seriously interfered with the power of the Eastern District Court to maintain the integrity of the order. Moreover, all of plaintiff's constitutional challenges could have as easily been made in the Eastern District so it is apparent relief was possible in that district. We therefore hold that because the injunction against TEA interfered with the integrity of the order from the Eastern District, the Southern District Court should have declined jurisdiction. We therefore direct the United States District Court for the Southern District to dissolve the injunction, to vacate all orders,<sup>1</sup> and to transfer the action to the proper court or dismiss.

REVERSED and REMANDED with instructions.

1. It is unnecessary to address the question of whether the district court erred in denying government's motion to intervene on appeal from the judgment of the court for the Southern District, because, as the court lacked jurisdiction the judgment is without force and the appeal no longer exists.

GODBOLD, Circuit Judge specially concurring:

I agree with the result but reach it by a different route.

No party to this case, brought in the Southern District of Texas, appealed from the order of that district court, entered January 30, 1976, granting a permanent injunction. The United States timely moved to intervene after judgment, setting out that TEA had decided not to appeal. Post-judgment intervention for purposes of appeal is permissible upon a proper showing, and one of the reasons for allowing intervention is that the intervenor can prosecute an appeal that the existing but unsuccessful party has determined not to take.<sup>1</sup> We have jurisdiction of the appeal from the order of January 30, 1976, if, and only if, we first hold that the motion to intervene should have been granted. I would hold that the district court erred in refusing to permit intervention by the United States for purposes of appeal, and then, reaching the merits, would rule as does the majority.

The majority's approach, set out in text and in footnote 1, is that first it must satisfy itself whether the case was properly heard below, and upon such examination the majority concludes that the district court had no jurisdiction, thus "the appeal no longer exists." The error with this is, of course, that until the United States is permitted to intervene this court has no viable notice of appeal before it and no jurisdiction to examine the jurisdiction of the district court.

1. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977); *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (C.A. 7, 1976); *State of Arizona v. Hunt*, 408 F.2d 1086 (C.A. 6), cert. denied, 396 U.S. 845, 90 S.Ct. 81, 24 L.Ed.2d 95 (1969); *Pellagrino v. Nesbit*, 203 F.2d 463 (C.A. 9, 1953); *Smuck v. Hobson*, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969); 7A Wright & Miller, Federal Practice and Procedure § 1916 pp. 582-83.

UNITED STATES COURT OF APPEALS

Fifth Circuit

Office of the Clerk

Edward W. Wadsworth  
Clerk

Tel 504-589-6514  
600 Camp Street  
New Orleans, La. 70130

September 22, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-2926—Gregory-Portland Independent School District, Et. Al. v. Texas Education Agency and J. W. Edgar, U.S.A.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,  
Clerk

By /s/ SALLY HAYWARD  
Deputy Clerk

UNITED STATES COURT OF APPEALS  
For The Fifth Circuit

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October Term, 1978

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No. 76-2926

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D. C. Docket No. CA-73-C-175

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GREGORY-PORTLAND INDEPENDENT  
SCHOOL DISTRICT, ET AL.,  
Plaintiffs-Appellees,

versus

TEXAS EDUCATION AGENCY  
and J. W. EDGAR,  
Defendants,

UNITED STATES OF AMERICA,  
Movant-Appellant.

---

Appeal from the United States District Court for the  
Southern District of Texas

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Before GEWIN, GODBOLD and MORGAN, Circuit  
Judges.

JUDGMENT

This cause came on to be heard on the transcript of  
the record from the United States District Court for the  
Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here  
ordered and adjudged by this Court that the order of the  
District Court appealed from, in this cause be, and the  
same is hereby, reversed; and that this cause be, and the  
same is hereby remanded to the said District Court with  
directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to  
defendants, the costs on appeal to be taxed by the Clerk  
of this Court.

July 10, 1978

GODBOLD, Circuit Judge, filed a specially concurring  
opinion.

Issued As Mandate: OCT. 2, 1978.

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

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CIVIL ACTION NO. 5281

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UNITED STATES OF AMERICA

v.

STATE OF TEXAS, ET AL.

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MODIFIED ORDER

This Court's Order of April 20, 1971, in the above-entitled and numbered civil action is hereby modified to comply and conform with the directions of the United States Court of Appeals for the Fifth Circuit in its Opinion of July 9, 1971, in Cause No. 71-1061, entitled *United States of America, Plaintiff-Appellee, versus State of Texas, Et Al., and Dr. J. W. Edgar, Commissioner of Education, Et Al., Defendants-Appellants*, \_\_\_F.2d\_\_\_ (5 Cir. 1971), and, as so modified, such Order is re-issued, as follows:

On November 24, 1970, this Court entered an order in this case then styled *United States of America v. State of Texas, et al.*, Civil Action No. 1424, Marshall Division, requiring *inter alia* that the Texas Education Agency, the State Commissioner of Education and their officers, agents, employees, successors re-evaluate all of their activities and practices relating to the desegregation of

public elementary and secondary education within the State of Texas; upon completion of this re-valuation the defendants were required to file a plan stating specific actions which they would take pursuant to their affirmative obligations under Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution. On January 15, 1971, the defendants filed their plan. Plaintiffs filed a response to this plan on February 1, 1971, incorporating both objections to defendants' plan and recommendations for what the defendants were legally required to accomplish by this plan. An evidentiary hearing was held on February 1 and 2, 1971. A further hearing was held in Tyler on April 12, 1971, the case then, and hereafter, being styled Civil Action No. 5281, Tyler Division.

The Court has carefully considered the submissions of the respective parties and the evidence presented at the hearings, in light of the defendants' affirmative duty to take "whatever steps might be necessary to . . . [eliminate] racial discrimination root and branch." *Green v. New Kent County*, 391 U.S. 430, 437-38 (1968), *Swann v. Charlotte-Mecklenburg Board of Education*, Nos. 281 and 349, \_\_\_U.S.\_\_\_\_, (April 20, 1971). In this regard the duty of the state appears to be two-fold: *First*, to act at once to eliminate by positive means all vestiges of the dual school structure throughout the state; and *second*, to compensate for the abiding scars of past discrimination.

Accordingly, it is hereby ORDERED that the State of Texas, Dr. J. W. Edgar, Commissioner of Education of the State of Texas, the Texas Education Agency, their officers, agents, employees, successors and all other per-

sons in active concert or participation with them (hereinafter referred to as defendants) shall fulfill those duties as follows:

#### A. *Student Transfers*

(1) Defendants shall not permit, make arrangement for or give support of any kind to student transfers, between school districts, when the cumulative effect in either the sending or receiving school or school district will be to reduce or impede desegregation, or to reinforce, renew, or encourage the continuation of acts and practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.

(2) The Texas Education Agency shall review all student transfers and shall notify the sending and receiving districts promptly of all transfers which do not appear to comply with the terms of this Order.

(3) If, after receiving notice of the Texas Education Agency's refusal to approve transfers, the receiving district shall continue to accept the transfer of students, or if the sending district shall refuse to provide suitable educational opportunities for these students, defendants, after 15 days notice to the President of the Board of Trustees and the Superintendent (if the district has such an official), shall refuse to transfer the funds, based on the average daily attendance of the transfer students involved to the account of the receiving district, and shall, thereby, terminate and refuse to grant or continue paying to the offending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students transferring in violation of this Order.

(4) Defendants shall also refuse to distribute to the offending district any transportation funds which might accrue on account of transfer students accepted in violation of this Order. If the offending district continues to refuse to deny transfers which adversely affect desegregation, the Texas Education Agency shall warn the district that its accreditation status is in danger. This warning shall remain in effect for ten days, at which time, if the offending district has failed to correct its violations, the Texas Education Agency shall suspend the district's TEA accreditation.

#### B. *Changes in School District Boundaries*

(1) Defendants shall not permit, make arrangements for, approve, acquiesce in, or give support of any kind to changes in school district boundary lines—whether by detachment, annexation, or consolidation of districts in whole or in part—which are designed to, or do in fact, create, maintain, reinforce, renew, or encourage a dual school system based on race, color, or national origin.

(2) Defendants shall require the board of trustees of any school district desiring to annex or consolidate with a nearby district, in whole or in part, or desiring to change its boundaries in any other manner such as is described, for example, in Part II-A(2) of the Court's Order of November 24, 1970, to report said intention to the Commissioner of Education for the State of Texas at least 15 days prior to the effective date of such action, and shall take appropriate measures to insure compliance with this requirement.

(3) Whenever the Commissioner shall receive notice that a district or a portion of a district is to be detached

from, annexed to, or consolidated with another district, he shall institute an immediate investigation as to the effects of such projected change of boundaries on the desegregation status of all of the school districts concerned. He shall promptly notify the appropriate county and local officials of his findings, and indicate whether or not the transfer of territory is in violation of the law.

(4) If county and local officials proceed to consummate the transfer of territory after being notified that they are in violation of the law, defendants, after 15 days notice to the President of the Board of Trustees and the Superintendent of the district (if the district has such an official), shall refuse to transfer funds, based on the average daily attendance of the students in the territory detached, annexed or consolidated, to the account of the new district, and shall, thereby, terminate and refuse to grant or continue paying to the offending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students detached, annexed or consolidated in violation of this Order. These funds shall be distributed to the remainder of the original district, in cases of illegal detachments, but shall not be used by that district to support the education of children living in the detached area. In cases involving the consolidation of whole districts, the Texas Education Agency shall hold the funds derived from the average daily attendance of the students illegally annexed to or consolidated with the new district in escrow pending dissolution of the illegal transfer of territory and the return of students to their original districts.

(5) Defendants are enjoined from granting "incentive aid" payments pursuant to Texas law (Art. 2815-4,

Vernon's Texas Revised Civil Statutes as amended), to districts which are enlarged by annexations or consolidation actions in violation of this Order.

(6) Should a county board of education or a school district, having received notice from the Commissioner that a territorial alteration has been disapproved, fail to disavow the action and to declare its effects null and void, the Texas Education Agency shall notify the district that its accreditation status is in danger. This notice shall remain in effect for 10 days, at the end of which time, if the offending district has failed to correct its violations, the Agency shall suspend the district's TEA accreditation.

(7) In all cases involving annexation or consolidation of school districts, the Texas Education Agency shall apply the portions of the Order of the Court in this case dated April 19, 1971, concerning the annexation of nine all-black school districts to nearby bi-racial districts, and specifically, the portions of that Order relating to faculty and staff and to bi-racial committees, to the newly enlarged districts and shall require the said district to submit to the Texas Education Agency such reports as may be necessary to enable that Agency to determine whether the newly enlarged district is operating and will continue to operate in compliance with Title VI and the Fourteenth Amendment.

### *C. School Transportation*

(1) Defendants shall not permit, make arrangement for, acquiesce in, or give support of any kind to bus routes or runs which are designed to, or do in fact, create, maintain, reinforce, renew, or encourage a dual school system based on race, color, or national origin.

(2) The transportation system in those county units and school districts having transportation systems shall be completely re-examined each year by the Texas Education Agency. Bus routes and runs as well as the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis. Bus routes and runs shall be constituted to provide that each bus operated by a district picks up every pupil along the route or run who is assigned to the school or schools and grade levels served by that bus. Where two or more equally efficient and economical routes or runs are available in a given area of the school district, the route or run which would promote or facilitate desegregation of buses shall be adopted by the district and approved by the Texas Education Agency rather than a route or run which, whether by intent, inaction, or inadvertence, would maintain or encourage segregation.

(3) Accordingly, if upon examination of transportation systems, the Texas Education Agency shall find that a district is operating one or more bus routes or runs which serve 66% or more students of a minority group, which are duplicated by one or more routes or runs serving more than 66% students of another race or ethnic background, the Texas Education Agency shall immediately investigate and determine whether the heavily minority routes or runs may be re-routed, terminated or combined with routes or runs which serve non-minority students so as to desegregate these routes or runs. In no event shall this paragraph be construed as requiring any fixed percentage of students of a minority group on a particular route or run.

(4) If the Texas Education Agency finds that a county or local district is operating its transportation system in violation of this Order, it shall notify the appropriate officials of the local district. If the offending district refuses to alter its bus routes or runs so as to avoid segregation in instances where the Texas Education Agency has determined that such alterations are necessary, or if such a district persists in operating bus routes or runs which adversely affect the desegregation of its schools, classes, or extra-curricular activities, the Texas Education Agency shall refuse to approve the entire route structure of the district, and shall, thereby, terminate and refuse to grant or continue paying state transportation funds to the offending district until it shall have altered all routes or runs operated in violation of this Order, so as to eliminate all vestiges of discrimination based on race, color, or national origin. In addition, the Texas Education Agency shall notify the district that its accreditation status is in danger. This notice shall remain in effect for 10 days, at which time, if the offending district has failed to correct its violations, the Agency shall suspend the district's TEA accreditation.

#### *D. Extra-Curricular Activities*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to activities run in connection with the elementary and secondary educational program operated by the state or any of its county and local educational agencies which, whether by intent, inaction, or inadvertence, results in segregation or other discrimination against students on the ground of race, color, or national origin. These extra-curricular activities include, but are not limited to, student govern-

ment organizations, athletic teams for inter-scholastic competition, clubs, hobby groups, student newspaper staffs, annual staffs, band, band majorettes and cheerleaders.

(2) The Texas Education Agency shall instruct the members of its accreditation review teams in conjunction with its Title IV staff, to examine the extra-curricular activities of each district which they review. All violations of this Order which are discovered by such investigations shall be reported to the Commissioner of Education. If the Texas Education Agency receives complaints from any source that a school district is operating and supporting extra-curricular activities in violation of this Order, immediate investigation shall be made of such complaint.

(3) If the Commissioner finds that a district is operating and supporting extra-curricular activities in violation of this Order, he shall notify the county or local school district through the President of its Board of Trustees and through the Superintendent (if the district has such an official), that the district is operating in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. At the same time, he shall warn the district that its accreditation is in danger. This warning shall remain in effect for 10 days, at which time, if the district has failed to correct the violations, the Texas Education Agency shall suspend the district's TEA accreditation.

(4) In addition to the suspension of the accreditation of districts operating discriminatory extra-curricular activities, the State of Texas and the Texas Education Agency shall reduce the percentage of state funds granted to the district under the Minimum Foundation Program

for salaries and operating expenses by ten percent. Should the district persist in operating its extra-curricular activities in a manner which results in segregation or discriminatory treatment of students on account of race, color, or national origin, the State of Texas and the Texas Education Agency shall reduce the percentage of state funds as described above by an additional ten percent, for each semester or term that the violations continue.

(5) Defendants are required to consider that a suspension or reduction of programs and activities to avoid operating them on a desegregated basis continues a violation of Title VI and the Fourteenth Amendment.

(6) Any school district aggrieved by the proposed reduction or the reduction of Minimum Foundation Program Funds, or the proposed suspension or the suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said Court may deem proper.

#### *E. Faculty and Staff*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to the hiring, assigning, promoting, paying, demoting, reassigning or dismissing, or treatment of faculty and staff members who work directly with children in a discriminatory manner on account of race, color or national origin. Defendants shall be responsible for the application and enforcement throughout the State of the provisions of the Order of the Court in this case dated April 19, 1971, referred to in Section B(7) herein, and specifically, the portions

of that Order relating to the treatment of faculty and staff.

(2) In carrying out its affirmative duties under Title VI and the Fourteenth Amendment in this area, the Texas Education Agency shall require each county or local educational agency desiring to receive state funds under the Minimum Foundation Program to include with its preliminary application for such funds a list of objective, non-racial and non-ethnic criteria by which the county or local district will measure its faculty and staff for assignment, promotion, demotion, reassignment or dismissal and by which it will judge prospective employees for faculty and staff positions.

(3) The Texas Education Agency shall require the members of its accreditation review teams, in conjunction with the members of its staff designated to work in collaboration with the United States Office of Education to provide technical assistance to desegregating school districts pursuant to Title IV of the Civil Rights Act of 1964 (hereinafter referred to as "Title IV staff" or "Title IV personnel"), to examine the faculty and staff hiring and assigning practices of the districts which they visit for accreditation purposes, and to examine the records relating to hiring, assigning, promoting, paying, demoting, reassigning or dismissing of faculty and staff who work directly with children for a period including the three years prior to the complete elimination of the district's dual school structure. The review teams and state Title IV personnel shall also examine faculty assignments within each school district under review to determine whether the percentage of minority teachers in each school is substantially the same as the percentage

of minority teachers in the school district as a whole, as required under Part II, Section A of the Order of this Court dated April 19, 1971, and referred to in Sections B(7) and E(1) herein. Any evidence of discriminatory practices concerning faculty and staff shall be reported to the Commissioner of Education.

(4) After such further investigation as deemed necessary by the Commissioner, he shall notify the district through the President of its Board of Trustees and its Superintendent (if the district has such an official), of any acts and practices with regard to faculty and staff which violate the areas described in Part II, Section A, of the Order of this Court, dated April 19, 1971, referred to in Section B(7), E(1) and E(3) herein. At the same time, he shall warn the district that its accreditation is in danger. This warning shall remain in effect for 15 days, at which time, if the offending district fails to correct its violations with regard to faculty and staff who work directly with children, the Texas Education Agency shall suspend the district's TEA accreditation.

(5) In addition to the suspension of accreditation, the State of Texas and the Texas Education Agency shall refuse to approve the district's application for state funds under the Minimum Foundation Program for salaries, and shall, thereby, terminate and refuse to grant or continue paying such funds to the district.

(6) Any school district aggrieved by the proposed termination or the termination of Minimum Foundation Funds or the proposed suspension or the suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas,

in which this suit is pending, for such relief as said Court may deem proper.

(7) This Order shall not be construed to have any effect upon the state or federal remedies available to any individual members of Faculty or Staff for discriminatory action by a school district in assignment, demotion, dismissal, re-assignment, payment or other employment conditions.

#### *F. Student Assignment*

(1) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to the assignment of students to schools, individual classrooms or activities on the basis of race, color or national origin, except where required to comply with constitutional standards.

(2) Defendants, having identified pursuant to this Court's Order of November 24, 1970, school districts whose enrollment of minority race children is greater than 66% and whose total student population is fewer than 250 students, shall show cause by August 15, 1971, why each such school district should not be annexed to or consolidated with one or more independent school districts of over 150 students, or one or more common school districts of over 400 students, so as to eliminate its existence as a racially or ethnically separate educational unit.

(3) Defendants shall review each year all school districts in the state in which there exists schools enrolling more than 66% minority group students, as reported in accordance with Part II (E)(6) of the Court's order in this case dated November 24, 1970, and shall make

findings as to whether or not the student assignment plans of these districts have resulted in compliance with federal constitutional standards. On October 1, 1971, and on the same date each subsequent year until further order of this Court, defendants shall file a report with the Court indicating (1) the school districts reviewed and the particular findings concerning the assignment and transfer of students within each such district; (2) what steps each district is taking to eliminate their racially and ethnically identifiable schools and what recommendations defendants have proposed in this regard; and (3) what special cultural and educational activities these districts have instituted to compensate for the inherently unequal educational opportunities provided to students in these racially or ethnically identifiable schools. Copies of this report shall be served upon the Civil Rights Division of the United States Department of Justice and the Office for Civil Rights of the United States Department of Health, Education and Welfare. A copy of this report shall also be retained in the Offices of the Texas Education Agency in such a manner that it will be readily and conveniently available for public inspection during normal business hours.

(4) If a school district which is reviewed pursuant to paragraph F(3) is the subject of a school desegregation suit or a court-approved plan of desegregation, a copy of the report required by paragraph F(3) shall be submitted to the District Court having jurisdiction of such suit or plan.

#### *G. Curriculum and Compensatory Education*

(1) Defendants shall insure that school districts are providing equal education opportunities in all schools.

The Texas Education Agency, through its consulting facilities and personnel, shall assist school districts in achieving a comprehensive balance curriculum on all school campuses, and, where necessary, in providing for students to transfer to different schools in the district on a part-time basis to avail themselves of subjects not offered in their assigned school. Full time transfers may be allowed only where they do not adversely affect desegregation as further described in Section A herein.

(2) The Texas Education Agency shall institute a study of the educational needs of minority children in order to insure equal educational opportunities of all students. The Texas Education Agency shall request the assistance of the United States Office of Education and any other educational experts whom they choose to consult in making this study. By not later than August 15, 1971, a report on this study shall be filed by the Texas Education Agency with the Court including:

(a) Recommendations of specific curricular offerings and programs which will insure equal educational opportunities for all students regardless of race, color or national origin. These curricular offerings and programs shall include specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation, as well as programs and curriculum designed to meet the special educational needs of students whose primary language is other than English;

(b) Explanation of presently existing programs funded by the State of Texas or by the Federal Government which are available to local districts to meet these special

educational needs and how such programs might be applied to these educational needs;

(c) Explanation of specific standards by which the defendants will determine when a local district, which has racially or ethnically isolated schools or which has students whose primary language is other than English, shall be required by the defendants to participate in the special compensatory educational programs available; and

(d) Explanation of procedures for applying these standards to local districts including appropriate sanctions to be employed by the defendants should a district refuse to participate in special compensatory educational programs where it has been instructed to do so pursuant to application of the standards developed under subsection (c) above.

(e) Copies of this report shall be served as described in Section F above, and a copy shall also be retained in the Offices of the Texas Education Agency as described therein.

#### *H. Complaints and Grievances*

The defendants shall send to all county and local educational agencies an information bulletin designed to notify faculty, staff and patrons of local school districts of the availability of complaint and grievance procedures and to inform them of how to utilize these procedures. Defendants shall further require that every county and local educational agency shall place this bulletin on public display in such a way as to assure its availability at all times during school hours. A copy of this bulletin shall be filed with the Court on or before August 15, 1971, with a copy to the plaintiff.

### I. Notification

The defendants, in all cases where notification is given to a school district of imminent loss of accreditation or state funds because of its failure to meet the requirements of Title VI, Civil Rights Act of 1964 and the Fourteenth Amendment, shall, at the same time, notify the plaintiff. In the event that it becomes necessary to suspend the district's accreditation or to reduce or remove state funds the defendants shall also notify the plaintiff.

### J. Jurisdiction

(1) This Court retains jurisdiction of this matter for all purposes, and especially for the purpose of entering any and all further orders which may become necessary to enforce or modify this decree.

(2) Nothing herein shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suit.

SIGNED and ENTERED this 13th day of July, 1971.

/s/ WM. WAYNE JUSTICE  
United States District Judge

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

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CIVIL ACTION NO. 5281

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UNITED STATES OF AMERICA

v.

STATE OF TEXAS, ET AL.

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AMENDMENTS TO MODIFIED ORDER OF  
JULY 13, 1971

After extensive hearings relating to proposed modifications of this court's modified order of July 13, 1971, after due consideration of the evidence and the argument of counsel, it appears to the court that such order should be modified, as follows:

It is ORDERED that Section A be, and it is hereby, amended, so as hereafter to read as follows:

#### A. Student Transfers

(1) Defendants shall not permit, make arrangement for or give support of any kind to student transfers, between school districts, when the cumulative effect, in either the sending or receiving school or school district, will be to reduce or impede desegregation, or to reinforce, renew, or encourage the continuation of acts and

practices resulting in discriminatory treatment of students on the ground of race, color, or national origin.

(2) In applying the above section to student transfers between school districts, the defendants may grant the following classes of exceptions regardless of the race, color, or national origin of students.

(a) *Class One:* All transfers of students to county or multi-county day schools for the deaf.

(b) *Class Two:* Special education students from districts where the special education class for which the students are qualified is unavailable and such class is available in the receiving district, provided such students have been properly screened according to Texas Education Agency guidelines by the receiving districts.

(c) *Class Three:* The Commissioner of Education may grant additional transfers in hardship situations. Before such transfers are granted by the Commissioner, the parties will be notified at least 30 days in advance of the intent to grant such transfers and the reasons therefor. The parties may object to such transfers to the court, and the court may approve or disapprove such transfers with or without a hearing.

(3) In addition to the above exceptions, defendants shall use the following guidelines to determine the cumulative effect of student transfers in the various school districts of Texas.

(a) Where student transfers between school districts involve ethnic consideration concerning race,

color or national origin of students, only hardship situations shall be considered, and such transfers shall be governed by the procedure in Paragraph A(2)(c), above.

(b) In such situations, the defendants shall not approve transfers where the effect of such transfers will change the majority or minority percentage of the school population, based on average daily attendance in such districts by more than one per cent (1%), in either the home or the receiving district or the home or the receiving school.

(4) Defendants may use the following additional guidelines in approving or disapproving student transfers between the various school districts in Texas:

(a) The Agency will review and apply this Section to all in-grade transfers between school districts in Texas.

(b) The Agency will investigate all complaints of violations of its decisions made pursuant to Section A of the Court Order.

(c) The Agency will from time to time solicit the assistance of other agencies, both State and Federal, in arriving at a decision under Section A of this Court Order, but the Agency shall not be bound by such recommendations.

(d) The Agency will consider as factors relevant to its decision in approving or disapproving student transfers under this Section: (1) whether the receiving district or the home district is composed solely of students of one race or ethnic origin, (2) whether

all the students seeking transfers are of one race or ethnic origin, and (3) whether the sending or receiving school district is operating under the provisions of an order issued by another District Judge requiring said school district to eliminate segregation on the ground of race, color, or national origin.

(e) The Agency will use such additional guidelines as may be ordered by the court. The Agency may also use such guidelines as adopted by the Agency and submitted to the court and to all other parties, in writing, provided no objection is filed by the parties to said agency-adopted guidelines within twenty-one (21) days of the filing of said guidelines with the court or their receipt by certified mail, return receipt requested, by the parties. In the event of objection by the parties or the court within such period, the Agency may request a hearing for approval of said guidelines by the court.

(5) The Texas Education Agency shall review all student transfers and shall notify the sending and receiving districts promptly of all transfers which do not appear to comply with the terms of this order.

(6) If, after receiving notice of the Texas Education Agency's refusal to approve transfer, the receiving district shall continue to accept the transfer of students, or if the sending district shall refuse to provide suitable educational opportunities for these students, defendants, after 15 days notice to the President of the Board of Trustees and the Superintendent (if the district has such an official), shall refuse to transfer the funds, based on the average daily attendance of the transfer students involved to the account of the receiving district, and shall, thereby,

terminate and refuse to grant or continue paying to the offending district a percentage of state funds equivalent to the district's entitlement based on the average daily attendance of the students transferring in violation of this order.

(7) Defendants shall also refuse to distribute to the offending district any transportation funds which might accrue on account of transfer students accepted in violation of this order. If the offending district continues to refuse to deny transfers which adversely affect desegregation, the Texas Education Agency shall warn the district that its accreditation status is in danger. This warning shall remain in effect for ten days, at which time, if the offending district has failed to correct its violations, the Texas Education Agency shall suspend the district's TEA accreditation.

(8) The State Board of Education shall entertain no appeal from any decision of the Agency which applies sanctions against a school district in compliance with this or any preceding order of this court. However, any school district aggrieved by the proposed reduction or the reduction of funds, or the proposed suspension or the suspension of accreditation, shall have the right to petition the United States Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.

It is ORDERED that Section F be, and it is hereby amended, so as hereafter to read as follows:

#### *F. Student Assignment*

(1) Defendants are required to consider forthwith the application of the procedures and provisions of this order

to any school district reviewed pursuant to Section F of this court's Modified Order of July 31, 1971, where (a) such review has been conducted at any time prior to the entry of this order, (b) such district was found to be in violation of federal constitutional standards, and (c) specific recommendations designed to eliminate such violations were provided to the district by the defendants but have not been implemented.

(2) Defendants shall not permit, make arrangement for, acquiesce in or give support of any kind to the assignment of students to schools, individual classrooms or other school activities on the basis of race, color, or national origin, except where required to comply with constitutional standards.

(3) Defendants shall review each year all school districts in the state in which there exists schools enrolling more than 66% minority group students, as reported in accordance with part II(E)(6) of the Court's Order in this case dated November 24, 1970, and shall make findings as to whether or not the student assignment plans of these districts have resulted in compliance with the terms of this order. Priority shall be given to any district about which the defendants receive specific complaints. Any district found not to be in compliance shall be notified that it is in violation, and, further, shall be provided in writing by the defendants with a specific detailed plan designed to eliminate all such violations of the terms of this order. Defendants shall be required to take all measures necessary to insure that whenever possible, the notice and plan provided for herein shall be received by the district at least 45 days prior to the beginning of the next semester or term. As to any district re-

viewed at any time prior to the entry of this order, defendants shall serve the notice and plan provided for herein forthwith in order that the sanctions provided hereafter in this order be made applicable to the school semester or term starting on or about September 1, 1973.

(4) If, by the end of the first week of the semester or term following receipt of the notice and plan provided for in paragraph F(3), a district has failed to implement such plan, or, has failed to adopt and implement an equally effective alternate plan to eliminate all racially or ethnically identifiable schools found to be in violation of constitutional standards as provided by paragraph F(3), the defendants shall warn the district through the President of its Board of Trustees and through its Superintendent (if the district has such an official) that its accreditation is in danger. This warning shall remain in effect for ten days after which time, if the district has still failed to achieve compliance, the Texas Education Agency shall suspend the district's TEA accreditation.

(5) In addition to suspension of accreditation and simultaneously therewith defendants shall suspend payment of all state funds to the district under the Minimum Foundation Program for salaries, operating expenses, transportation and all other purposes.

(6) Defendants shall suspend immediately without further notice the accreditation and the payment of all Minimum Foundation Program funds of any district which changes or otherwise modifies a plan adopted and implemented pursuant to paragraphs F(3) and F(4) herein when such changes or modifications are designed to, or

do in fact, recreate, renew, reimplement or result in violation of federal constitutional standards.

(7) On or before June 1 of each school year until further orders of this court, defendants shall file a report with the court indicating (a) the school districts reviewed and the particular findings concerning the assignment and transfer of students within each such district, (b) all recommendations made and actions taken by the defendants and each such district to eliminate racially or ethnically identifiable schools, (c) what special cultural and educational activities these districts have instituted to compensate for the inherently unequal educational opportunities provided to students in these racially or ethnically identifiable schools. Copies of this report shall be served upon the Civil Rights Division of the United States Department of Justice, the Office for Civil Rights of the United States Department of Health, Education and Welfare and all parties to this action. A copy of this report shall also be retained in the offices of the Texas Education Agency in such a manner that it will be readily and conveniently available for public inspection during normal business hours.

(8) Any school district aggrieved by the proposed reduction or the reduction of Minimum Foundation Program funds or the proposed suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.

(9) If a school district which is reviewed pursuant to paragraph F(3) is the subject of a school desegregation suit or a court-approved plan of desegregation, a

copy of the report required by paragraph F(3) shall be submitted to the District Court having jurisdiction of such suit or plan.

It is further ORDERED that Section J shall be amended, so as hereafter to be designated as Section K.

It is further ORDERED that such modified order of July 13, 1971, be amended by the addition of a new section, to be designated as Section J, which shall read as follows:

*J. Conveyances of Real Property by a School District*

(1) Defendants shall not permit, make arrangement for, approve, acquiescence in or give support of any kind to sales, leases or other conveyances of real property by a school district where such conveyances are designed to or do, in fact, create, maintain, reinforce, or encourage a dual school system based on race, color or national origin.

(2) Defendants shall require the board of trustees of any school district desiring to sell, lease or otherwise convey any interest in real property or buildings to report said intention to the Commissioner of Education for the State of Texas at least 15 days prior to the effective date of such conveyance and shall take all appropriate measures to insure compliance with this requirement.

(3) Whenever the Commissioner shall receive notice that a district intends to sell, lease or otherwise convey any interest in real property, he shall promptly notify the appropriate local school officials that the following language shall be incorporated into the instrument of conveyance, sale or lease and, further, that failure of the

district to comply with this requirement will result in the imposition of sanctions as set out in paragraph J(4):

"Subject nevertheless to the following covenant, condition and restriction:

The [name of grantee, lessee, etc., as the case may be] [his heirs, personal representatives, or assigns, or its successors and assigns, as the case may be] shall not, for the period of fifty (50) years from the date hereof, use or permit the use of the realty herein described, or any part thereof, for the operation of a school or any other facility used in conjunction with any institution of learning, study, or instruction which unlawfully discriminates against persons on the basis of race, color, or national origin, or which tends to create, maintain, reinforce, renew, or encourage a dual school system within the public school district in which such realty is now or may be situated.

For so long as such realty is used for a purpose other than the uses or purposes forbidden and proscribed in the preceding sentence, the estate herein granted and the title and right to possession of such property shall remain in the [name of grantee, lessee, etc., as the case may be] [his heirs, personal representatives, and assigns or its successors and assigns, as the case may be]. If, during such fifty (50) year period, such realty is used, or permitted to be used, in violation of the covenant, condition, and restriction above specified, the estate herein granted shall expire and shall immediately revert to grantor, and grantor shall be entitled to immediate title and possession of such property, without the necessity of a re-entry or suit.

(4) If a school district, after notice from the Commissioner, proceeds to sell, lease or otherwise convey

any interest in real property but fails to comply with the requirements set forth in paragraph J(3) herein, the defendants shall proceed to impose sanctions in accordance with the following:

(a) The Commissioner shall notify the proper official or officials of the school district that the district is not in compliance and that, unless the district initiates legal proceedings in a court of competent jurisdiction, within thirty days from date of the notice, to reacquire possession of the property, the payment of all state funds to said district under the Minimum Foundation Program for salaries, operating expenses, transportation and all other purposes shall be suspended. If the district initiates legal proceedings as required but, in the judgment of the Commissioner, the district fails to prosecute said proceedings expeditiously and in good faith, the Commissioner at any time thereafter may suspend the payment of all state funds to the district. Any party to this action who has reason to believe or to question that the Commissioner is not proceeding as required herein may, upon proper motion, apply to this Court for whatever relief is indicated, at law or at equity.

(b) In the event that a school or other facility used in conjunction with any institution of learning which would constitute a breach of the condition set forth in paragraph J(3) is operated on the real property conveyed by the district, the defendants shall suspend the payment of state funds under the Minimum Foundation Program for salaries, trans-

portation and all other purposes, operating expenses, and, simultaneously therewith, defendants shall suspend the district's TEA accreditation. The suspension of funds and of accreditation as provided in this subparagraph shall continue until such times as the school or other institution of learning which was the basis for these sanctions has ceased operation or until such time as the district in question has taken steps to exercise its rights of reversion and has reacquired the property in question.

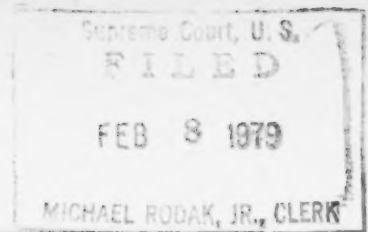
(5) Defendants are enjoined from granting TEA accreditation to any school or other facility used in conjunction with any institution of learning, study or instruction, the operation of which would constitute a breach of the condition set forth in paragraph J(3).

(6) Any school district aggrieved by the proposed suspension or the suspension of Minimum Foundation Funds, or the suspension of accreditation shall have the right to petition the United States District Court for the Eastern District of Texas in which this suit is pending, for such relief as said court may deem proper.

SIGNED and ENTERED this 9th day of August, 1973.

/s/ WM. WAYNE JUSTICE  
United States District Judge

No. 78-985



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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GREGORY-PORTLAND INDEPENDENT SCHOOL DISTRICT,  
ET AL., PETITIONERS

v.

TEXAS EDUCATION AGENCY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530*

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GREGORY-PORTLAND INDEPENDENT SCHOOL DISTRICT,  
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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

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Petitioners seek review of the judgment of the court of appeals directing the district court to vacate all orders previously entered and to transfer or dismiss the present action on the ground that the court should not have enjoined certain respondents from complying with an order entered by another district court in the same state. In reaching this decision, the court of appeals applied settled principles of law, and petitioners raise no issue warranting this Court's review.

1. The United States and respondent Texas Education Agency (TEA) are currently parties to a suit in the Eastern District of Texas<sup>1</sup> in which the district court

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<sup>1</sup>*United States v. State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (1971), aff'd and modified, 447 F. 2d 441 (5th Cir. 1971), cert. denied, 404 U.S. 1016 (1972).

ordered TEA "to insure equal educational opportunity by refusing to fund and accredit those school districts still discriminating on the basis of race," *inter alia*, in student assignment (Pet. App. 39, 67-71). The district court's order provided (Pet. App. 70) that any school district aggrieved by action taken by TEA pursuant to the order

shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.<sup>[2]</sup>

2. On November 5, 1973, pursuant to its duties under this order, TEA notified the petitioner, Gregory-Portland Independent School District, that its student assignment policies were in violation of that order and requested that petitioner adopt either one of two plans proposed by TEA or a plan which would accomplish the same result. The letter stated that if a plan was not adopted by the end of the first week of the next school semester, TEA would, after a ten-day notice period, apply the sanctions provided in the *State of Texas* order.<sup>3</sup> Petitioners refused to implement any plan (Pet. App. 39), but instead, on December 14, 1973, filed the instant action against respondent TEA, *et al.*, in the United States District Court for the Southern District of Texas (*ibid.*). The petitioners sought a declaratory judgment to the effect that they had not discriminated in the operation of the school system and an order permanently enjoining the suspension of accreditation and fund termination by TEA (Pet. App. 39-40).

<sup>2</sup>This language was added to the district court's order at the suggestion of the court of appeals, see *United States v. State of Texas*, *supra*, 447 F. 2d at 441-442.

<sup>3</sup>The sanctions, provided in subsections (4) and (5) of Section F of the August 9, 1973 order, consisted of suspension of state accreditation and state funds under the Minimum Foundation Program (Pet. App. 69).

3. TEA filed a motion to dismiss on the ground that its actions had been taken pursuant to the order of the district court for the Eastern District of Texas in *United States v. State of Texas*, *supra*, and requested the Southern District court either to dismiss the action or to transfer it to the Eastern District.

On January 24, 1974, the district court below granted petitioners' motion for a preliminary injunction (Pet. App. 1-5). A hearing was held on TEA's motion to dismiss for want of jurisdiction. Thereafter, the United States filed a brief as *amicus curiae* supporting TEA (Pet. App. 7). However, on February 28, 1974, the district court denied the motion, concluding that the instant suit came within language in the State of Texas order that

[n]othing herein shall be deemed to affect the jurisdiction of any other district court with respect to any presently pending or future school desegregation suit.

(Pet. App. 9).<sup>4</sup>

Following a hearing, the district court, on January 30, 1976, granted petitioners their requested relief, permanently enjoining TEA from taking any action against petitioners to enforce any portions of the order in *United States v. State of Texas* (Pet. App. 14-29). After learning that TEA did not intend to appeal that judgment, and within the 30 day time period provided by Fed. R. App. P. 4(a), the United States sought leave to intervene for the purpose of appeal. On May 14, 1976, the district court denied that motion as untimely and for lack of a substantive interest in the outcome of the suit (Pet. App. 30-37).

<sup>4</sup>On June 3, 1974, the United States filed a petition in the United States Court of Appeals for the Fifth Circuit for a writ of mandamus directing the Southern District court to discontinue proceedings or to transfer them to the Eastern District. On December 30, 1974, the court of appeals denied the writ (Pet. App. 11-13).

The United States appealed from the denial of the motion to intervene in order to raise the issue of the propriety of the district court's refusal to dismiss or transfer the case. On July 10, 1978, the court of appeals concluded that (Pet. App. 41)

because the injunction against TEA interfered with the integrity of the order from the Eastern District, the Southern District Court should have declined jurisdiction.

It directed the district court to dissolve the injunction, vacate all orders, and transfer the action to the proper court or dismiss (*ibid.*). In a footnote, the court of appeals stated that it was unnecessary to address the question whether the district court erred in denying the motion of the United States to intervene, since the court lacked jurisdiction to entertain the action in which intervention was sought (*id.* at 41 n.1). However, in a special concurrence Judge Godbold reasoned that (Pet. App. 42)

until the United States is permitted to intervene this court has no viable notice of appeal before it and no jurisdiction to examine the jurisdiction of the district court.<sup>5]</sup>

4. Petitioners' suit essentially sought review of the order entered by the United States District Court for the Eastern District of Texas in *United States v. State of Texas*, *supra*, and a determination whether respondents TEA, *et al.*, have correctly interpreted the provisions of that order.<sup>6</sup> As the court of appeals below correctly held,

<sup>5</sup>He stated that he would hold that the district court erred in refusing to permit intervention for purposes of appeal (Pet. App. 42).

<sup>6</sup>The district court erred in concluding that its jurisdiction over the instant suit came within the proviso in the *State of Texas* order for

petitioners have addressed their concerns to the wrong forum (*Covell v. Heyman*, 111 U.S. 176, 182 (1884)):

The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity \* \* \*.

Although *Covell* dealt with potential conflicts between state and federal courts, the principles of comity are equally applicable to cases presenting potential conflicts between two federal courts. *Bergh v. State of Washington*, 535 F. 2d 505 (9th Cir.), cert. denied, 429 U.S. 921 (1976); *Spencer v. Kugler*, 454 F. 2d 839 (3d Cir. 1972); *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F. 2d 403 (5th Cir. 1971).

The district court in its February 28, 1974 memorandum accompanying the order denying respondents' motion to dismiss or transfer stated (Pet. App. 8):

We are concerned if the Commissioner has properly carried out Section [(F)(1)] of the order of the Tyler Court.

The question of compliance with an order of a district court properly rests with the court issuing the order and should not ordinarily be determined by another district court. The court in the *State of Texas* case has provided petitioners with an adequate remedy for resolution of questions concerning TEA's actions taken pursuant to its order (Pet. App. 70):

“any presently pending or future school desegregation suit” (Pet. App. 62). The suit brought by petitioners was an attempt to halt TEA's efforts to obtain desegregation of petitioners' schools through the methods authorized in the *State of Texas* litigation. There is no reason to believe that the Eastern District court contemplated that suits challenging its order could be brought in other district courts.

Any school district aggrieved \* \* \* shall have the right to petition the United States District Court for the Eastern District of Texas, in which this suit is pending, for such relief as said court may deem proper.

In holding that the district court under these circumstances should have declined jurisdiction, the court of appeals acted properly.<sup>7</sup>

5. It may well be that the concurring judge in the court of appeals was correct in suggesting that the appellate court should have considered the issue of intervention by the United States before proceeding to determine whether the district court had jurisdiction over the case (Pet. App. 42). Any error, however, is not of a nature which warrants review by this Court, since it would not affect the judgment. As the concurring opinion correctly noted (Pet. App. 42), post-judgment intervention for the purpose of appealing is proper where the initial party has declined to appeal so long as intervention is sought promptly after the entry of final judgment. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Stallworth v. Monsanto Co.*, 558 F. 2d 257 (5th Cir. 1977); *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969); *Pellegrino v. Nesbit*, 203 F. 2d 463 (9th Cir. 1953).<sup>8</sup>

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<sup>7</sup>Petitioners' argument that they should not be required to travel to a more distant forum ignores the fact that if TEA's actions had been taken solely under state law, review could be had only in a state court located in the county where TEA is located, *i.e.*, Travis County, Texas. Tex. Educ. Code Ann., tit 2, §11.13(c) (1972). The provisions of the *State of Texas* order are thus consistent with centralized review under state law.

<sup>8</sup>Although the court of appeals did not address the issue whether the United States had the requisite interest to enable it to intervene, the fact that the order which it had obtained in the *State of Texas* suit was being collaterally attacked supplies that interest.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

FEBRUARY 1979